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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1884.

NOS. 625, 626.

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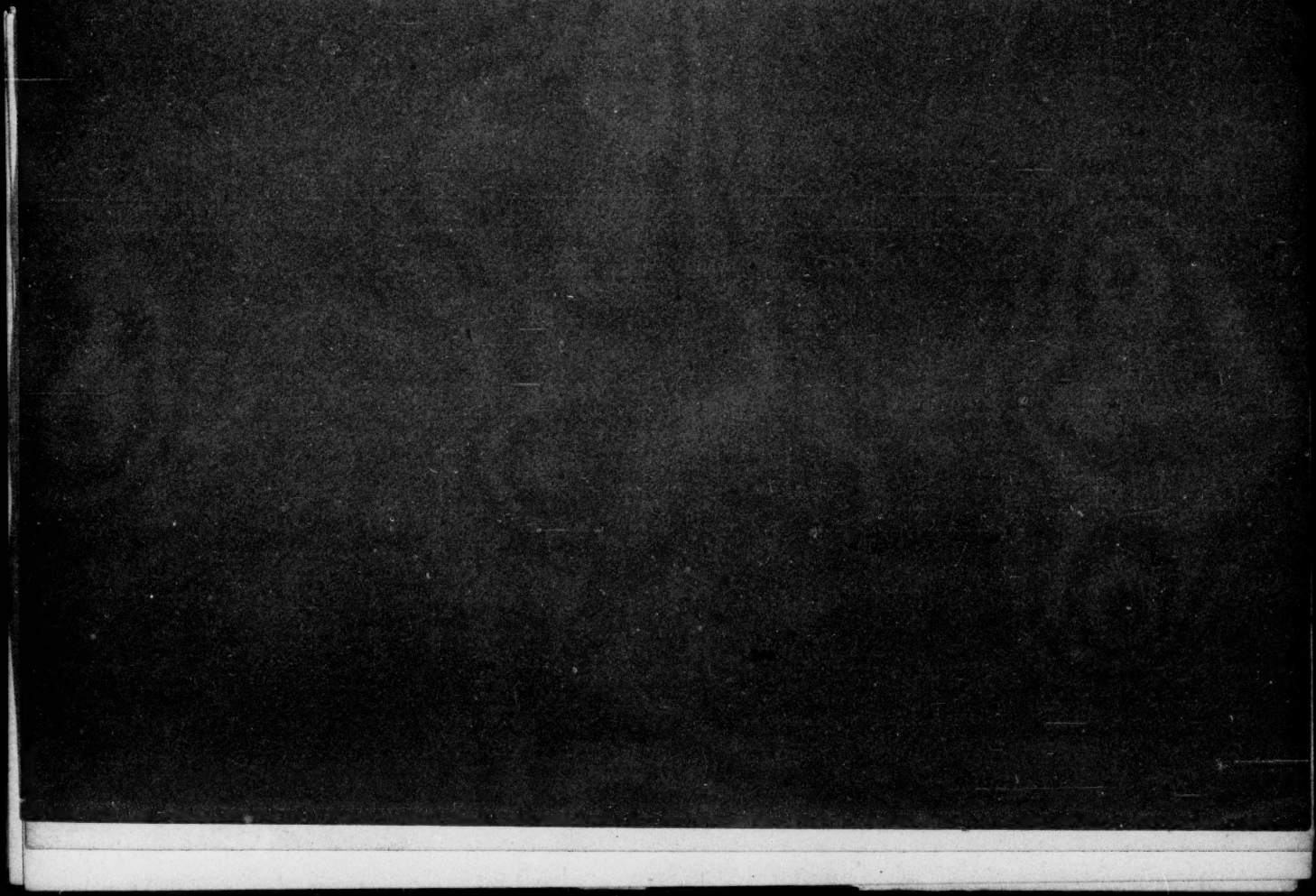
No. 626.—THE UNITED STATES, APPELLANTS, vs. JAMES W. HARVEY AND JAMES LIVESEY.

APPEALS FROM THE COURT OF CLAIMS.



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1 In the Court of Claims, December term, 1882.

JAMES W. HARVEY AND JAMES LIVESEY,
versus
THE UNITED STATES. } No. 11406.

I.—*Certification of former record on appeal to the Supreme Court of the United States.*

It appears of record in this case that on an appeal in equity to the Supreme Court of the United States from the judgment rendered by the Court of Claims on the 13th day of May, A. D. 1878, the record was duly certified up to said Supreme Court on the 24th day of June, A. D. 1878, by the following certificate, to wit:

JAMES W. HARVEY AND JAMES LIVESEY,
vs.
THE UNITED STATES. } No. 11406.

2 I, John Randolph, assistant clerk of the Court of Claims, do hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause; of the findings of fact by the court, and the conclusions of law thereon; of the judgment entered June 4, 1873; of the pleadings in equity under the act of Congress approved August 14, 1876; of the evidence filed and at the hearing of the said cause offered and read in behalf of the said claimants and of the defendants; of the opinion of the court and the dissenting opinions; of the decree of the court, and of the application of the claimants for and the allowance of an appeal to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Washington, this twenty-fourth day of June, A. D. 1878.

[SEAL.] JOHN RANDOLPH,
Ass't Clerk Court of Claims.

3 II.—*Mandate of the Supreme Court reversing the decree of Court of Claims and remanding cause for further proceedings.—Filed May* 23, 1882.

UNITED STATES OF AMERICA, *ss:*

[SEAL.] The President of the United States of America to the honorable the judges of the Court of Claims, greeting:

Whereas lately, in the Court of Claims, before you, or some of you, in a cause between James W. Harvey and James Livesey, claimants, and The United States, defendant, No. 11406, wherein the decree of the said Court of Claims, entered in said cause on the 13th day of May, A. D. 1878, is in the following words, viz:

"The court, upon due consideration of the premises, find in favor of the defendants, and do order, adjudge, and decree that the said petition of the

claimants, James W. Harvey and James Livesey, be dismissed," as
4 by the inspection of the transcript of the record of the said Court of Claims, which was brought into the Supreme Court of the United States by virtue of an appeal agreeably to the act of Congress in such case made and provided, fully and at large appears.

And whereas in the present term of October, in the year of our Lord one thousand eight hundred and eighty-one, the said cause came on to be heard before the said Supreme Court, on the said transcript of record, and was argued by counsel:

On consideration whereof it is now here ordered, adjudged, and decreed by this court that the decree of the said Court of Claims in this cause be, and the same is hereby, reversed.

And it is further ordered that this cause be, and the same is hereby remanded to the said Court of Claims with directions to proceed in it according to law and in conformity with the opinion of this court, 8th May, 1882.

You therefore are hereby commanded that such further proceedings be had in said cause, in conformity with the opinion and decree of
5 this court, as according to right and justice and the laws of the United States ought to be had, the said appeal notwithstanding.

Witness the honorable Morrison R. Waite, Chief Justice of said Supreme Court, the seventeenth day of May, in the year of our Lord one thousand eight hundred and eighty-two.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Filed May 23, 1882.

III.—*Argument and submission of case.*

At a Court of Claims held in the city of Washington on the 12th day of April, A. D. 1883, this cause was argued by Mr. Totten for the claimants and by Mr. Blair for the defendants and submitted.

And on the 26th day of April, A. D. 1883, Mr. Totten was further heard for the claimants in this case, and Mr. Blair replied for the defendants.

6 IV.—*Syllabus and opinion of the court, filed April* 30, 1883.

In Equity

In 1869 the defendants invited proposals for constructing the piers and abutments of a bridge from Rock Island to Davenport. The claimants' bid was accepted, and a written contract prepared and signed. The claimants made preparation to begin work, and began it, but were stopped by the defendants, who changed the plans of the piers by narrowing them. The claimants then notified the defendants to build coffer-dams for the piers and make excavations for the masonry beds, or that such work would be done by claimants and defendants held for the cost and expense. The defendants declining to do this, the claimants did it at their expense, so long as they continued in the work. In the autumn of 1870 the defendants took possession of the work and finished it. The claimants brought suit in the Court of Claims at common law,

maintaining that the written contract did not conform to the proposal and bid; that the latter expressed the true terms of the contract; and claiming to recover for the cost of the coffer-dams, pumping the same and excavating and preparing beds for the masonry; and also demanding their loss in profits by reason of narrowing the piers, which did not decrease the expensive exterior masonry, but took effect only on the cheap interior masonry, in which were the principal profits of the work. The court gave judgment for the claimants on other items, but held that the claimants were bound by the written contract, and gave judgment for the defendants on the above items (8 C. Cls. R., 501). Congress then conferred equity jurisdiction on the Court of Claims to reform the contract and render such judgment as justice and right might require. The court decided that the written contract expressed the will of the parties, and declined to take jurisdiction of the question of the narrowing of the piers (13 C. Cls. R., 322). The Supreme Court reversed the rulings on each point (105 U. S., 671). The case is now heard for the execution of the mandate.

Held:

That the provisions of R. S. § 3744 are waived by the special act conferring equity jurisdiction in this case; but that in common-law suits the provisions requiring contracts with the War, Navy, and Interior Departments to be in writing and signed at the end are mandatory. The recent decision in The South Boston Iron Company's case adhered to.

That the claimants, having been notified at the outset that the defendants expected them to construct the coffer-dams, and having on their part notified the defendants that they should construct them and hold the defendants liable for the cost and expense thereof, cannot prove that cost and expense by the evidence of experts as to its probable amount, the same being specific facts within their knowledge and control, and not within the knowledge and control of the defendants.

That the defendants having introduced the evidence of experts on the same points the claimants can have the benefit of it as a foundation of a judgment.

In the said suit at common law the court found that the cost of completing the work at the time the defendants took possession was equal to the contract price, and held that the claimants were entitled to no judgment for profits. Nevertheless the court did in that judgment include an allowance for the contract price for 1,527 cubic yards of stone prepared for interior masonry, but not set.

7 Held:

That this was an allowance of profits, and that the same amounted to $8.65 per cubic yard; and that, though they cannot be recovered back or the judgment reopened, a court of equity must take notice that they are substantially the same profits now demanded by reason of the reduction of the piers.

Also held:

On the authority of Tilson v. The United States (100 U. S., 43), that the claimants are not entitled to recover interest.

Having regard to the rule of the Supreme Court which requires a finding of the facts "in all cases," and to the ruling of that court in this case that it must review the facts in a case like the present, the court finds the ultimate facts in issue separate from the conclusions of law.

OPINION.

DAVIS, *J.*, delivered the opinion of the court.

This controversy began in a common-law suit in this court, tried in 1872—Harvey & Livesey v. The United States (8 C. Cls. R., 501). After that judgment was paid Congress conferred upon this court special equity jurisdiction to enable it to give the claimants further relief. The suit in equity under that enabling act was first heard on demurrer as to the extent of the relief which the court should give in the new process (Same v. Same, 12 C. Cls. R., 141). When this was settled the case was heard on the merits on the identical proof presented in the common-law suit (Same v. Same, 13 C. Cls. R., 322). The Supreme Court sustained the rulings of this court on the demurrer, but reversed the rulings on the merits (Same v. Same, 105 U. S. R., 671). The case now comes to us to have the will of the Supreme Court executed.

I. The controversy grows out of a contract by the claimants to construct the piers and abutments of a bridge to connect Rock Island with Davenport. The first contention related to the evidence of the contract. The claimants contended that there was a material variation, to their injury, between the bids and proposals on the one hand and the written contract on the other; that the variation was caused by mutual mistake, and that the court should resort to the bids and proposals for the true evidence of the contract.

This court was unanimous at the common-law trial that it could not look behind the written contract to ascertain the intent of the parties. At the hearing in equity three judges were of opinion that the evidence did not show the mutual mistake which is necessary to enable a court of equity to reform a written agreement. The fourth judge did not concur in this result, and the Supreme Court sustains him. It says:

"The written bid, in connection with the advertisement, and the acceptance of that bid, constituted the contract between the parties, so far as regards the question whether the contract prices embraced the coffer-dam work. (Garfielde v. United States, 93 U. S., 242; Equitable Insurance Co. v. Hearne, 20 Wall., 494.) The written contract, in that respect, was intended by both parties to be merely a reduction to form of the statement as to work and prices contained in the bid. * * * We are of opinion that by the actual contract between the parties the appellants were not to do any of the work covered by the claim made by them under item 1 of the petition herein, and that the written contract must be reformed accordingly."

This mandate of the Supreme Court is obeyed in the judgment about to be entered. It is proper before ordering it, to call attention to the fact that this suit is in equity; so that the action of the court under its extraordinary special powers is not to be cited as authority in common-law suits.

The claimants' contract was made with the War Department. It came within the provisions of the act of June 2, 1862, requiring all contracts with the War, Navy, and Interior Departments to be reduced to writing and signed by the contracting parties with their names at the
8 end thereof. In the suit at common law we regarded the contract which complied with the provisions of this act as the only contract between the parties. When Congress, however, conferred upon the courts

the power of reforming this contract, it waived the rigid requirements of the act of 1862. It authorized us to go behind evidence which that act makes conclusive, and ascertain the agreement of the parties from the proof contained in the bid and proposals.

In the recent case of the South Boston Iron Company Judge Scofield, for the court, carefully considered the section of the Revised Statutes which codifies this part of the act of 1862. He said that we regard the provision requiring both parties to sign at the end of the contract as mandatory. Unless an instrument purporting to be a contract with the War, Navy, or Interior Department complies with the mandate, or unless Congress waives the requirements of the statute, the instrument can have no validity against the United States in a court, except as evidence of the worth of services or labor actually performed or rendered under it. The court may treat the contract, when signed in conformity with the provisions of the statute, as relating back, when necessary to protect other interests, as in Adams's case (1 C. Cls. R., 192); or when work has been done under it before signing, as in Powers's case, and in Shipman v. The District of Columbia, both decided at the present term; but this does not modify the general rule which requires it to accept as evidence of such a contract only the instrument reduced to writing in conformity with the provisions of the statute.

II. The next contention related to the cost of the coffer-dams necessary to enable the workmen to construct the piers. On this point the Supreme Court says:

"In regard to the coffer-dams it seems clear to us that the ruling of the Court of Claims was erroneous. The advertisement begins by inviting proposals for the construction of the piers and abutments of the bridge. Standing alone this would involve proposals to make coffer-dams and do and furnish everything else necessary to finished work. But this is qualified by what follows. The advertisement goes on to say that parties making bids will state (1) the price per cubic yard of solid masonry at which they are willing to complete the work, the United States furnishing the stone, cement, and sand, 'and nothing more.' 'To complete the work' there means to construct the piers and abutments complete, including the making of coffer-dams. * * * Then parties making bids are also to make a bid stating (2) separately the price per cubic yard of solid masonry at which they will undertake to build the piers and abutments, the United States furnishing stone, cement, and sand; and also to make a bid stating (3) separately the price at which they will agree to put in the necessary coffer-dams with their protections. * * * The appellants did not make a bid for the work complete, or say in their bid that they were willing to complete the work. They bid only under bid 2. * * * They excluded bid 3 and the coffer-dams, and they excluded bid 1 and the coffer-dams in it. This is quite enough to determine the question. The written bid in connection with the advertisement, and the acceptance of that bid, constituted the contract." * * *

Under this ruling we must determine what the claimants did in constructing coffer-dams, and in pumping the water from the space inclosed in them, and in excavations for the preparation of the bed for the masonry. We understand the Supreme Court to hold that the contract related to the masonry only.

There were ten coffer-dams in all. It was necessary to pump the water out and to keep it pumped out from the space walled in by each. The shale, gravel, and mud above the solid rock had to be excavated in order to prepare beds for the masonry. The piers were in different depths of water, varying from $\frac{3}{10}$ of a foot at low water on the Iowa side to $20\frac{5}{10}$ feet at low water at pier No. 5.

The amount of excavation to be made after reaching the river bed varied also. At the Davenport abutment there were from $1\frac{1}{2}$ to 2
9 feet of earth, gravel, and loose rock. At pier No. 1 there was nothing. At pier No. 2 there were from $3\frac{1}{2}$ to 4 feet of gravel. At pier No. 3 there was no excavation. At pier No. 4 there were 3 feet of gravel at the upper end, and only 6 inches at the lower. At pier 5 there were 6 or 7 feet of gravel. At the upper rest there was about a foot of gravel on the Iowa side and none on the island side. At the pivot-pier there was no gravel. At the lower rest no excavation was necessary. At the island abutment there was a rock excavation of 5 feet for which the claimants were paid as extra work.

From these causes the cost of constructing coffer-dams and of doing the necessary pumping and excavation must have been much greater at some piers than at others. It is impossible that the dams, or the pumping, or the excavation could either of them have been subject to a general rule of relation to the cost of the masonry in a pier.

The defendants constructed the coffer-dam for piers 3 and 5 and completed coffer-dam No. 2, built the inside dam of pier No. 4, and built two-thirds of the coffer-dams for the upper rest for the draw. The claimants constructed the remainder.

The defendants did the pumping at pier 2, 3, 4, and 5, and at the upper rest. The claimants did the similar work at the remainder of the piers and at the abutments.

The only excavation done by the claimants was at the upper rest and the island abutment. The claimants prepared the bed for the masonry at the Davenport abutment, at pier 1, at the three piers at the draw, and at the Iowa abutments, the defendants did the remainder of this work.

The burden of proving the worth of labor performed and services rendered is always on the party seeking to recover it. In this case there are special reasons why the claimants should bear that burden.

It is now settled by the decision of the Supreme Court that when the contract was made, both parties understood that the United States were to make the coffer-dams. But unless we are to discredit Army officers of rank and high character, it also seems reasonably clear that up to two or three days before the 13th of September, 1869, the local agents of the Government at Rock Island and the Bureau of Engineers had not been informed of this construction of the contract, and understood it otherwise. On that day the claimants wrote to General Warren:

"We hereby request that the United States shall forthwith construct the requisite coffer-dams, exhaust the water therefrom, and prepare the bed for said piers and abutments when necessary for the commencement of the work."

Two days later they filed with General Warren a protest, in which they said;

"We do hereby protest against such refusal of the United States to build

said dams, and pump the water therefrom, and prepare said beds, and do hereby notify the United States that we shall proceed at once to build said dams, pump the water therefrom, and prepare said beds, and shall hold the United States for the payment of the costs and expenses of the same."

To this protest General Warren replied:

"In order not to delay the work I consent to the work going on until the matter can be referred to the United States Attorney-General, but in this consent it must be considered that nothing is admitted in favor of the claim of the contractors to their interpretation of the contract."

It does not appear that the opinion of the Attorney-General was ever taken by the War Department. General Warren wrote as follows to General Rodman.

"As you were the officer who executed the contract on the part of the United States, will you please inform me if there was anything implied in any way which justifies the protest made by Messrs. Harvey & Livesey. It seems to me clear that they having made all the preparations for putting in the coffer-dams, and only entering their protest against doing so just as they were going at the work, shows that this is an afterthought of theirs, and not only not according to the wording of the contract, but not according to their own understanding of it at the time it was made."

To this General Rodman replied:

"My understanding of the contract at the time it was signed, was that Messrs. Harvey & Livesey were to put in the coffer-dams, prepare foundations, and do and furnish everything except the stone, sand, and cement necessary to the completion of the piers and abutments, and I was then and am now fully impressed with the belief that they so understood it."

The opinion of Major Edson, who drafted the advertisements and drew the written contract, was also obtained to precisely the same effect. The papers were then referred to the Judge-Advocate-General, who replied:

"Upon the contract and the statements of Generals Warren and Rodman, I can come to no other opinion than that which they have arrived at in regard to the obligation of the contractors to build the coffer-dams, pump them out, &c., as incident to the erection of the piers and abutments. * * * Any claim which they may hereafter make for damages or additional compensation on account of being required to perform the work against which they have protested can be met and properly defended when formally presented or prosecuted."

This opinion was communicated to General Warren, with a letter in which it was said:

"The Secretary of War approves your action in permitting the contractors to go on with the construction of the piers after they had protested against your decision and action in relation to the coffer-dams, &c.; but that protest will not be recognized by you in any way as a condition under which the contractors continue work; nor is it to be considered as forming any agreement or understanding between yourself and them, nor as having been assented to in any manner or degree on the part of the United States."

The substance of this was communicated to the claimants, and down to the day when the work was taken from them by the United States they did work on the coffer-dams and in preparation of beds for the

masonry with knowledge that their claim for compensation for it would be disputed and could only be recognized at the end of a lawsuit. We are of opinion that under the circumstances, if they intended to demand payment from the United States "of the cost and expenses of the same," to use the language of their protest, it was their duty to keep accurate accounts of the same and produce them here. The details and amount of those costs and expenses were facts within their knowledge and control, and not within the knowledge and control of the United States.

Instead of presenting such detailed statements the claimants rely upon the opinions of experts. Some of these experts give their opinions generally that it would cost as much to build the coffer-dams as to construct the masonry within them. We have already seen that from the nature of the work such opinions have no value whatever.

The evidence of two other experts is offered by the claimants.

Of these one is a civil engineer, who made estimates of the cost of coffer-dams with reference to a bill for this identical work. His opinions are founded upon drawings made by a civil engineer in the defendants' employ at that time, without knowledge of the actual work done, and his estimate is $15 a running foot.

The other is a civil engineer, apparently of considerable experience, who estimates from the same plans, and who occasionally saw the
11 work, but without giving it particular attention. If facts and figures which undoubtedly were within the knowledge and control of the claimants, and which in our opinion are still within them, can be proved by expert testimony, then this witness's evidence is entitled to the weight which belongs to the opinions of a person in the same line of business as the claimants, and evidently biased in their favor; and the evidence of the other witness is entitled to the weight to be attached to such a jumping conclusion.

But in our opinion the cost of these coffer-dams and the work connected with them is a fact to be proved by evidence of the items which go to make it up, and not by the opinions of any man as to its worth, however learned he may be in his craft. In a controversy as to such cost, where neither party has access to the items which actually went into it, the evidence of experts might possibly be admissible. But in a case where one of the parties has control of these items, and especially where he has been notified in advance that he will be expected to prove them, and has undertaken to do so, we cannot admit such proof.

The logical result of the claimants' failure to produce the requisite proof would have been the dismissal of their petition as to this part of their case if the defendants had not supplied the defect. The defendants' testimony on this point is also open to the objection that it is in the nature of expert testimony; but we think that, being offered by the defense, it is competent for the claimants to use it and have the benefit of it. It is, too, evidence of a higher character and more trustworthy than that offered by the claimants. One of the witnesses is the officer of the Army who superintended the work during the whole period; who saw the claimants construct their coffer-dams, make their excavations, and prepare the beds for their masonry; who did the same work for the United States after the work was taken from the claimants, and who audited the bills for the work done by the Government. The other is a civil engineer who was in the employ of the Government on this work during the whole period, and who made the

plans upon which the claimants' experts founded their opinions. Their testimony relates to the cost of the dams, the pumping, the excavations, and the beds for masonry, each separately.

COFFER-DAMS.

Scott's and Captain Stickney's estimates for the coffer-dams are as follows; but Scott includes the cribs and breakwaters, while Stickney does not, but makes a separate estimate for them at $4,000 for all:

	Scott.	Stickney.
Davenport abutment	$781 18	$781 18
Pier No. 1	1,446 31	1,614 02
Pier No. 2	2,363 83	1,614 02
Pier No. 4	3,933 28	2,987 63
Upper rest	3,107 92	2,294 92
Pivot	2,187 92	1,762 16
Lower rest	2,081 73	1,619 07
Island abutment	1,348 17	1,241 40
Add to Captain Stickney's estimate seven-tenths of $4,000, the cost of the cribs, &c., the United States having furnished the other three-tenths in the three dams built by them		2,800 00
	17,250 34	16,001 02

The average of their two estimates is $16,625.68. But from this should be deducted the worth of the work done by the defendants on the
12 coffer-dams. We have seen that they did some work on the dams for piers 2 and 4. We have no means of knowing how much it was, and, therefore, we dismiss it. On the dam for the upper rest they did two-thirds of the work. Deducting this amount we have—

Average of the estimates for the whole		$16,625 68
Deduct two-thirds average of the dam for upper rest		1,934 28
Cost of work done by claimants on coffer-dams		14,691 40
Pumping:		
Davenport abutment	$198 00	
Pier 1	172 50	
Pivot-pier	232 50	
Lower rest	165 00	
Island abutment	195 00	
		963 00
Excavations:		
Upper rest	77 55	
Island abutment	220 00	
		297 55
Preparation for masonry:		
Davenport abutment	69 00	
Pier 1	46 00	
Upper rest	92 00	
Pivot-pier	46 00	
Lower rest	23 00	
Island abutment	23 00	
		299 00
		16,250 95

The sum of these items represents all that the claimants are entitled to recover on this branch of their case under the mandate.

III. The next contention was as to a supposed loss of profit to the claimants by reason of a change in the shape of the piers. At the argument it was stated that this claim related only to the piers, not to the abutments. The claimants contend that the plans referred to in the proposals, and upon which they based their bid, and which, under the decision of the Supreme Court, were a part of their contract, contemplated larger piers than those which were actually constructed. They say that their bid was founded upon a relation between the amount of cut-stone masonry and the amount of coarse masonry, which was changed to their disadvantage in the new plans. The reduction of the whole amount of masonry caused by narrowing the piers took effect, they say, in the coarse masonry in the interior, leaving the dressed surface substantially the same in both plans.

The court has no satisfactory way of knowing what General Rodman's plans were, or how far they were examined by the claimants. We can find out, however, what amount of masonry the claimants expected to construct when they entered into their contract. The proposals estimated the total amount at about 10,000 cubic yards. The bid was in response to these proposals, and both proposals and bid form part of the reformed contract. And as late as September, 1870, the claimants wrote that when they contracted they supposed the amount of masonry to be done was about 10,000 cubic yards.

The actual amount in the work as constructed was $8{,}594\frac{81}{100}$ cubic yards, or, to adopt the more vague language of the proposals, about 8,600 cubic yards.

13 It thus appears that the extreme limit of a demand under this head would be for 1,400 cubic yards; and as the agreed profits for interior masonry was $8.65 per cubic yard, there would be due the claimants, on the assumption that all the masonry abandoned in the new plan was interior masonry, and that they were entitled to recover their profit on the whole amount of the diminution, the sum of $12,110.

But the claimants had completed only about half the masonry—in fact a little less than half. We think they should in any event only receive this allowance on the part completed by them. The amount of $12,110 should therefore be reduced at least to $6,055.

But this is subject to a still further reduction. The work consisted of abutments and piers. The claimants make no demand for reduction in the abutments. More than half of the work done by the claimants was in abutments. This again reduces the item of $6,055 down to at least $3,027.50 on the theory most favorable to the claimants.

All this, however, depends upon vague methods of calculation, which a court should not adopt if better and more precise methods can be discovered.

We have, in General Warren's testimony, the means for estimating these amounts exactly. General Warren succeeded General Rodman in charge of the work. He was the officer who revised General Rodman's plans and made the new plans. He was well acquainted with both plans. He says:

"Taking the whole draw-pier at my location, his (General Rodman's) pier contained 568 more cubic yards than mine. * * * Estimating

them to stand on an average in 6 feet of water, his plans contained 3,338 cubic yards for all five piers. My quantity was 3,285 cubic yards."

The "whole draw-pier" and "the five piers" cover all the work on which the present claim is made. In the draw-pier the diminution was 568 cubic yards; in all the other piers, 53 cubic yards; in all, 621 cubic yards. At $8.65 per cubic yard this amounts to $5,371.65.

This is the amount which the claimants would have been entitled to receive under the ruling of the Supreme Court had they constructed the whole of the piers.

But they did not construct the whole. The deposition of Harris, taken by the claimants, shows what had been done. He says:

"Being interrogated by F. H. Harvey, for the claimants, the witness says:

"Interrogatory. Did you work for Harvey & Livesey in the construction of the Rock Island bridge up to the time the Government took charge?

"Answer. I did.

"Interrogatory. Please state the position of the work at that time—of the several piers and abutments.

"Answer. The Iowa land abutment, the foundation, was laid up, and one course of cut-stone laid on it, with the exception of two little stones. The Iowa shore abutment was finished. Pier No. 1 was finished. Pier No. 2—the coffer-dam was built, pumped out, the traveler was up, and the jenny was ready for hoisting the stone, and a boat-load of stone was there. Pier No. 3—nothing had been done. Pier No. 4—the dam was built ready for pumping out, with one side of the traveler frame up. Pier No. 5—couldn't state anything further than that the cribs were put in and the breakwater on it. The pivot-pier was complete. The lower rest was complete. The upper rest—some stone was laid in it and part of the dam was built; one course of stone was laid half around, and about one-quarter of another course. The island shore abutment was complete. The island land abutment was complete, all except the coping; that is, as it could be completed for the want of coping.

"Interrogatory. Are the plans produced by you correct representations of the state of the work you have just described?

"Answer. Of the masonry part of the work they are; the breakwaters of pier No. 1 are finished, but not in the plan. Nos. 2 and 4 and the upper-rests are completed, but omitted in the plan. In every other respect

14 I believe the plan to be a correct representation of the state of the work of the bridge at the time the Government took charge of the work, and such plan, marked Exhibit 'B,' 'C,' and 'D,' as signed by me and the commissioner, I wish to be attached to this my deposition; and such plans, marked 'Exhibit B,' 'Exhibit C,' and 'Exhibit D,' and attached to my deposition, I wish to form a part of this my deposition. What I mean is, that there are three cribs instead of two (2) cribs, as shown on the plans, and planked across from crib to crib to complete the breakwater.

"Interrogatory. Do you mean to include the preparation of stone for the masonry to pier No. 2 and No. 4, the upper rest and No. 3 pier, and No. 5, as delineated on the plan?

"Answer. I do not include that; the masonry was not done in those piers."

It appears from this that the claimants did a large part of the work in the abutments and finished pier No. 1; that piers 2, 3, 4, and 5 were substantially constructed by the United States; that the pivot-pier and the lower rest were constructed by the claimants, and that the upper rest was substantially constructed by the United States. The diminution from Rodman's plans in the piers that were constructed by the claimants as follows, was as shown by Warren's testimony:

Pivot of the draw	76	cubic yards.
Lower starting	271	cubic yards.
Pier 1, $\frac{1}{7}$ of 53	7.5	cubic yards.
	354.5	cubic yards.

Which, at $8.65, would amount to $3,066.42. This is remarkably near the amount reached by the other method or calculation.

We find, then, the sum to which the claimants would be entitled, if they are entitled to recover anything, in consequence of the reduction in the piers to be $3,066.42.

But there is a serious reason why the claimants should recover nothing on this account. The findings of fact of this court in the common-law suit contained the following:

"As to the fifth item of said demand, as amended, the court finds that the claimants, before their ejectment from said work by the orders emanating from the Department of War, had done work upon and for said bridge under said contract to the amount of seventy-six thousand three hundred and forty-four dollars and forty-seven cents, the particulars of which are as follows:

Stone set in draw-pier, 1,556½ cubic yards, at $13 per yard	$20,234 50
Stone set in other piers, 2,599 cubic yards, at $11 per yard	28,589 00
Stone dressed, not set, 1,527 cubic yards, at $11 per yard, less $2.63 per yard, which it would have cost to set it	12,781 00
Stone received and handled, not set, and ready as backing to the 1,527 yards of the next preceding item, an equal quantity, viz, 1,527 cubic yards, at $11 per yard, less $2, which it would have cost to set it	13,743 00

* * * * * * *

The last two allowances are for stone which the claimants had on hand, and which the United States subsequently put into the work. As the claimants received the full contract price less the estimated cost of setting it, it is plain that they received their full profit on the work as finished work. It was stated in the argument, and was not controverted, that there was no profit in the dressed stone. There remains, then, the undressed stone for backing, on which it is conceded that the profit was $8.65 a cubic yard; or in all—

1,527 cubic yards @ $8.65 ..... $13,208 55

which has been already paid to the claimants.

On turning to the opinion of the court in the common-law suit we find the following:

"The record shows no ground of forfeiture, or reasonable apology for ejecting the claimants from the work. The act was unauthorized, and con-

stituted another breach of the contract, for which the law awards at least nominal damages. But the evidence fails to show actual damages, and therefore we have allowed none; on the contrary, the cost of finishing the work would have been, as shown by the proof, equal to the price to be paid for it."

It would appear then that the court, while deciding that the evidence failed to show damage, did actually award damages to a large amount.

The claimants attempt to explain this by referring to the terms of the unreformed contract, one of which was as follows:

"It is further stipulated and agreed that if any default shall be made by the parties of the first part in the performance of their work specified in this contract, of the quality and at the times and places therein provided, that then, in that case, the United States shall have the right to take entire and exclusive charge of the work and to complete it in accordance with the conditions prescribed in this contract, charging us with the entire cost of completing it, and crediting us with the amount per cubic yard heretofore stipulated to be paid us for the completion of the work."

They say that this finding is only the carrying out of this provision of the contract; that the court did actually charge the claimants with the entire cost of setting this stone, viz, $2 per cubic foot, and did actually credit them with the amount per cubic yard by the contract stipulated to be paid them for the work.

This argument would have greater force if the setting of those 1,527 cubic yards had been all that remained to be done on the work when it was taken from the claimants. But we know indisputably that the setting of those stones formed but a small part of the work which remained to be done in order to complete the piers and abutments, and that in point of fact the United States did spend a very large sum of money after that time; so large as to warrant the language of the court in its opinion that "the cost of finishing the work would have been, as shown by the proof, equal to the price to be paid for it." It is true that this opinion was based upon the theory that the claimants were to construct the coffer-dams and make the excavations. But we have already seen that most of this work was done when the United States took possession, and that the cost of what remained constituted but a small part of the large expense to which the Government was put after that time.

The truth is, and we cannot shut our eyes to it, that the opinion shows that this court when it entered that judgment in the common-law suit did not do what the contract called for; it did not state an account between the United States and the claimants, charging them with the entire cost of completing the work and crediting them with the contract price of it, but it allowed them their full profits on a certain portion of the work, without taking into consideration the losses which they might have suffered in doing the rest. If the record is carefully examined it will be found that this is all the court assumed to do. The fifth item in the bill of particulars was—

"For constructing 4,400 cubic yards of masonry at, say, $12 per yard, $52,800."

The court in the finding above cited finds that the claimants had done work under the contract, "the particulars of which are as follows," and among the particulars of the work done under the contract were the 1,527 cubic yards of stone which were never put into the wall by the claimants.

The court did not regard this as work done by the United States, and the provision of the contract now invoked, which relates exclusively to work done by the United States, has no bearing upon it.

If this allowance made to the claimants in the former judgment is not an allowance of profits on work not done by them, we are unable to understand what such profits are; and if it is not the identical thing which the claimants are now seeking to recover, we are equally at fault.

16 It is worthy of remark, in this connection, that the record contains a statement of account between the parties, in which the amount paid by the United States on the vouchers for completing the piers and abutments after they took possession of the work was $86,653.24. The account as balanced shows an indebtedness by the claimants to the Government of $33,681.35. Making every allowance which could possibly be claimed for the cost of the coffer-dams after the Government took possession, the state of this account would still completely negative the theory on which the claimants try to maintain the rightfulness of the former judgment.

From this it appears that the claimants have already received some $13,000 as profits on masonry not constructed by them. Being allowed and paid to them under a judgment of this court not appealed from and not reversed, it cannot be recovered back. But the court, sitting as a court of equity, is certainly entitled to take the fact into consideration when asked, under the mandate of the higher court, to award the claimants a further sum for the same thing.

IV. But one item remains. The Supreme Court says:

"The question of interest, under item 8, remains for that court [*i. e.*, the Court of Claims] to consider."

We cannot but think that if the Supreme Court intended that we should allow interest on any sum that might be found justly due the claimants it would have directed us to allow it. We do not regard the suggestion thus thrown out at the close of this opinion as a direction to us to disregard the rule for our conduct in such cases carefully prescribed to us by that court in the case of Tilson v. the United United States (100 U. S. R. 43), a case which was sent to us under a special statute, as was this one. The court says:

"We have no doubt that it was the wish of those who procured the passage of the special statute under which the Court of Claims took jurisdiction of this suit to obtain from Congress authority for that court to give a judgment against the United States, at least for interest, in case it should be found that payment on the contracts held by the claimant had been unreasonably delayed. But if Congress had desired to grant such authority it would have been easy to have said so in express terms; and because it did not so, we are led irresistibly to the conclusion that it did not intend to give any such power."

Following this explicit direction, we disallow the claim for interest.

VI. It will appear from a candid recapitulation of the various results reached during this long litigation that the final allowances which we now make are substantially just as between the parties—certainly that they work no injury to the claimants.

In their suit at common law the claimants demanded damages for increase in the cost of the work by reason of having been compelled to do it in cold weather; for loss caused by the defendants' neglect to furnish

materials; for loss of machinery, vessels, and tools, and for extra work. The court found as fact that nothing was due them on these counts. These items, therefore, disappeared from the controversy as res judicata.

In the same suit they demanded payment for the work which they had actually done, and they were allowed payment in full for all the completed masonry. They were also allowed, in payment for the stone which they had prepared for use but not inserted in the piers, not only the small sum which would have been due them for the preparation, but also their full contract profits upon the whole amount. These items, also, then became res judicata, and were no longer subjects of controversy.

17 In the same suit they demanded damages for injuries caused by sundry alleged delays of the defendants which compelled them and their workmen and tools to remain idle. They were allowed a large compensation for the injuries. These disputes also were thus settled.

In the same suit they claimed pay for the cost of the coffer-dams and compensation resulting from the diminution of the piers, but the court said that as a common-law court it could not entertain these claims, founded upon an alleged mistake in the reduction of the contract to writing. It escaped the attention of the court at that time, and at both the hearings in equity, and it apparently escaped the attention of the higher court, that in the common-law suit this court did take jurisdiction over the claim for profits, and did allow them in full.

When our jurisdiction was enlarged the claimants renewed many claims which had been rejected in the old suit, and advanced new claims for profits which they alleged they had been deprived of; but all the claims which had been adjudicated, and all which might have been adjudicated at common law, were ruled out on demurrer, and the ruling was sustained above.

The claimants also renewed in equity their claims for the cost of the coffer-dams, and for damage caused by diminution of the piers, and advanced a new claim for interest. For reasons set forth in this opinion, we disallow two of these claims and allow the third as far as proved.

The result of all this litigation is this: The United States have paid and will pay for this work, excluding all sums paid for special damages and injury:

To the claimants		$76,344 47
To sundry persons on vouchers after taking possession of the work		86,653 24
The judgment in this suit		16,250 95
		179,258 66

On the claimant's theory as to the coffer-dams and on their valuation of them the United States should have paid:

Contract price of the work		$100,666 65
Cost of coffer-dams in dispute, alleged by the claimants to have been constructed by them	$75,000 00	
Cost of coffer-dams actually constructed by the United States	6,689 37	
		81,689 38
		182,356 02

This justifies the opinion already expressed that our decision, reached by the application of sound principles of law to the evidence, works substantial justice.

VII. At the close of its opinion the Supreme Court says that—

"The rule in regard to findings of fact has no reference to a case like the present, to equity jurisdiction conferred in a special case by a special act; and in such case, where an appeal lies and is taken under section 707 of the Revised Statutes, this court must review the facts and the law as in other cases in equity appealed from other courts."

Under these instructions and the general rule of the Supreme Court respecting appeals from this court, we present the following as our findings of the ultimate facts in this case and as our conclusions of law.

18 V. *Findings of fact and conclusions of law. Filed April* 30, 1883.

FINDINGS OF FACT.

I. That if the evidence in the record is admissible to prove the expense which the claimants were put to by reason of being obliged to put in coffer-dams and protecting them and making provisions for pumping the water therefrom, and for preparing the beds for the piers and abutments, then that expense amounted to $16,250.95.

II. That if the claimants are entitled to recover any sum in consequence of the reduction of the dimensions of the piers and abutments, they are entitled to recover therefor the sum of $3,066.42.

III. That if the claimants are entitled to interest on the amount allowed, or the claims sued for, or any part thereof, then, having in view the gradual reduction in the rate of interest, the court finds as a fact that the rate of interest to be allowed is four per cent.

CONCLUSIONS OF LAW.

I. That the claimants are not entitled to interest.

II. That the claimants are entitled to judgment for $16,250.95 on account of specification 1 in their petition.

III. That the claimants are not entitled to judgment on any other matters set forth in their petition, but as to all such the petition should be dismissed.

VI. *Judgment of the court.*

At a Court of Claims held in the city of Washington, on the 30th day of April, A. D. 1883, judgment was ordered to be entered as follows:

The court on due consideration of the premises, doth order, ad-
19 judge, and decree that the written contract between the parties, dated June 1, 1869, a copy of which is attached as Exhibit C to the original petition of the claimants in claimants' suit No. 6284, filed in this court December 14, 1870, be reformed in manner as requested by the claimants in their petition in this suit, and be made to conform to the intention of the parties as shown in the advertisement for the proposals for bridge masonry, a copy of which is attached to the said original petition as Exhibit A, and the bid of the claimants, a copy of which is attached to the said original petition, marked Exhibit B.

And it is further ordered, adjudged, and decreed that the claimants have and recover of the defendants the sum of sixteen thousand two hundred and fifty dollars and ninety-five cents ($16,250.95) for the labor done and materials furnished by the claimants in constructing coffer-dams, and in performing the work necessarily connected therewith, and preliminary to the masonry work for the piers and abutments referred to in their contract, the same being on account of specification one (1) in their petition in this case.

And it is further ordered, adjudged, and decreed that as to all the other items of claim in their petition in this suit said petition be dismissed.

20 VII.—*Application of claimants for and allowance of appeal.*

And now come the said claimants and complainants and appeal to the Supreme Court of the United States from the decree rendered in the above cause on the 30th day of April, A. D. 1883.

ENOCH TOTTEN,
Att'y for Appellants and Plaintiffs.

Filed June 21, 1883.

AT CHAMBERS, *June* 21, 1883.

Allowed.

C. D. DRAKE,
Chief Justice.

21 VIII.—*Application of defendants for and allowance of appeal.*

From the judgment rendered in the above-entitled cause on the 30th day of April, 1883, in favor of claimants, the defendants, by their Attorney-General, on the 23d day of June, 1883, make application for, and give notice of, an appeal to the Supreme Court of the United States.

THOMAS SIMONS,
Assistant Attorney-General.

Filed June 23, 1883.

AT CHAMBERS, *June* 23, 1883.

Allowed.

C. D. DRAKE,
Chief Justice.

22 In the Court of Claims.

JAMES W. HARVEY AND JAMES LIVESEY
versus
THE UNITED STATES.

I, John Randolph, assistant clerk of the Court of Claims, hereby certify that the foregoing are true transcripts of the certificate of the record on appeal to the Supreme Court of the United States, as duly certified upon the 24th day of June, A. D. 1878, of the mandate of said Supreme Court revising the decree of said Court of Claims, and remanding cause for further proceedings, of the proceedings thereunder, to wit, the argu-

ment and submission of the case, the opinion of the court, the findings of fact, and conclusions of law, of the judgment of the court, of the application of the claimants and defendants severally for the allowance of appeal to the Supreme Court of the United States and of the allowance of same by Chief-Justice Drake.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court of Claims, at Washington City, this day of , A. D. 1883.

[SEAL.]

JOHN RANDOLPH,
Ass't Clerk Court of Claims.

(Indorsement on cases:) Court of Claims. No. 625. James W. Harvey and James Livesey, appellants, vs. The United States and cross-appeal. No. 626. The United States, appellant, vs. James W. Harvey and James Livesey. Filed 3d October, 1883.

113-243

Office Supreme Court U. S.
FILED.
DEC 12 1884
JAMES H. McKENNEY.
CLERK.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1884.

No. 625 and 626.

JAMES W. HARVEY *et al.*, *Appellants*,

vs.

THE UNITED STATES,

AND

THE UNITED STATES, *Appellant*,

vs.

JAMES W. HARVEY *et al.*, *Appellees*.

Brief for Harvey & Livesey, Claimants.

ENOCH TOTTEN,
For Claimants.

R. O. POLKINHORN & SON, PRINTERS.

In the Supreme Court of the United States.

OCTOBER TERM, 1884.

Nos. 625 and 626.

JAMES W. HARVEY *et al.*, *Appellants*,

vs.

THE UNITED STATES,

AND

THE UNITED STATES, *Appellant*,

vs.

JAMES W. HARVEY *et al.*, *Appellees.*

Brief for Harvey & Livesey, Claimants.

These are cross appeals from a decree of the Court of Claims. The case was heard and decided upon the merits in this Court at the October Term, 1881 (105, U. S., 671), and was remanded to the Court of Claims for an assessment of damages. That court rendered a decree in favor of the petitioners, for the sum of $16,250.95, and both parties appealed. No new evidence was submitted in the court below, and the

cases are here on the record used before, together with the additional record of the subsequent proceedings, and the opinion of the Court of Claims.

The questions involved in these appeals may be briefly stated as follows:

1. *The contractors built nine coffer-dams in aid of the construction of the piers and abutments of a bridge extending across the Mississippi River from Rock Island to Davenport; the current was swift, and during the time of the work floods of unusual frequency and violence prevailed, and much of their work was washed away. Six of these dams were over 74½ feet long by 14 feet wide, and were built in an average depth of water of about 13 feet. The other three dams stood in water the average depth of which was between 6 and 7 feet, and one of them was 40×60 feet in dimension, one was 25×40, and the third was about 41 feet square. The Court of Claims decided that to furnish the materials and build these dams, under such circumstances, was reasonably worth the sum of $16,250.95 only, or about $1,8000.00 each.*

2. *The dimensions of the piers after the contract had been awarded, were greatly reduced by diminishing the width and preserving the length, thus making the reductions on the profitable work. This court decided that the contractors should be paid for this difference. The Court of Claims, notwithstanding, rejected this item on the ground that said court had, in its former judgment paid for it, although the said court in the opinion in its former judgment said it did not.*

Statement of the Case.

The plaintiffs, on the 14th day of December, 1870, exhibited their petition in the Court of Claims, based upon a contract dated June 1, 1869, (7) for constructing piers and abutments for a bridge over the Mississippi River at Rock

Island, demanding payment for work done and materials furnished in the performance thereof, and also for damages incurred by them in consequence of unreasonable delays caused by the officers of the Government. That cause was brought on for hearing on the evidence, and in June, 1873, a judgment was rendered in favor of the plaintiffs for the sum of $42,306.49. This sum was made up by the allowance of $20,068.00 for damages on account of delays, and the sum of $22,238.49 for the balance due for work done and materials furnished in building the masonry work. —(8 Court of Claims R., 501.) Two of the principal items of the plaintiffs' claim in that case were for the construction of the coffer-dams and for damages resulting from the unlawful reduction of the dimensions of the piers by which the inexpensive work was largely reduced in quantity, and the expensive work was preserved as originally contemplated. The Court of Claims decided that the proposal and bid constituted no part of the contract, and that the language of the final contract bound the plaintiffs to perform all the preliminary work necessary, including the construction of the coffer-dams; that court also held that by the terms of the contract the United States had the right "to fix the working plans and specifications," or, in other words, that the agents of the Government possessed the power to alter the dimensions of the piers and abutments in such manner as they might deem advisable for the interests of the Government, and that the plaintiffs could not lawfully object.—(See opinion of court, 8 C. C., 501.) That judgment of the Court of Claims was paid according to law. Afterwards the plaintiffs applied to Congress for further relief, and an act for their relief was passed and approved August 14, 1876. (343.)

August 30, 1876, the claimants exhibited their second petition in said court, by which they claimed, among other things, payment for the work and material put into the

coffer-dams, and for the loss occasioned to them by the unreasonable reduction in the sizes of the piers and abutments, by which the quantity of inexpensive work was largely diminished, while the expensive work was required to be done, for profits which they might have made if they had been permitted to carry out the contract according to its true intent, and for the interest on the money due them. To this petition a demurrer was interposed, which was sustained by the court.—(12 C. C., 240.) An amendment to the petition was then filed, upon which issue was joined. Afterwards, upon the suggestion of the court, a second amendment was filed, upon which issue was also joined.

The testimony used in the original case was, by virtue of a stipulation of counsel and an order of the court, used in the second trial. The cause was then heard upon the pleadings and evidence, and the Court of Claims rendered a decree dismissing the petition, and from such decree the plaintiffs appealed to this Court. This Court decided that the claimants should recover on two of the items of the claim, and remitted the question of interest to the Court of Claims for consideration.

The two items so sustained are those numbered 1 and 2 in the original petition in this cause, as follows:

1. For labor done and materials furnished by the plaintiffs in constructing the coffer-dams, and in performing the work necessarily connected therewith and preliminary to the masonry work for said piers and abutments;

2. For loss and damages resulting to the claimants in consequence of the reduction of the dimensions of the piers and abutments, made subsequently to the making of the contract.

The petitioners claimed upon the first item the sum of $75,000, and upon the second the sum of $33,600, with interest on both items.

I.

This Court, in the opinion referred to said, as to item one:

> "We are of opinion that by the actual contract between the parties the appellants were not to do any of the work covered by the claim made by them under item one of the petition herein."

Ten coffer-dams were necessary in the construction of the bridge, to wit, two for the abutments, five for the common piers (one for each), and three for the draw-pier; the draw-pier requiring one for the upper rest, one for the lower rest and one for the pivot.

The claimants completed eight of the dams (70, 74, 128, 130, 131, 132, 154, 157, 175, 233, 234, 238, 249), and did work on others amounting to one whole dam, making in all the equivalent of nine dams as follows:

	Depth of Water.
For Iowa Shore abutment - - -	
" Island abutment - - - -	5 feet.
" Pier No. 1 - - - - -	5.57 "
" " " 2 - - - - -	13 "
" " " 4 - - - - -	11.24 "
" " " 5, (Half completed) - -	20.5 "
" Pivot pier - - - - -	4.5 "
" Upper rest - - - - -	8.76 "
" Lower rest - - - - -	5.80 "

The dams for the upper rest and for pier No 4, were partially washed away and were rebuilt (176, 234, 131).

It is, of course, impossible to compute the amount of money which would be a reasonable compensation for the work and material for this item of dams, with mathematical accuracy, but this circumstance ought to be taken for and not against

the plaintiffs. They have been in the right in all their dealings with the Government from the outset. Much testimony has been adduced in the case to show what is a reasonable compensation for this most dangerous and precarious work. The fact will not be overlooked that these dams were constructed in the Mississippi River, the waters of which are always swift, and at a point where the average depth was over eight feet, and for the five small piers it was over 11 feet. (31, 105, 106.) The floods were frequent and great during the period of the operations of the petitioners. (63, 65, 66, 109, 125, 172, 175.) During all that time there were only fifty-five (55) days during which the water was less than four feet above low water. It is not usually expected that work shall be carried on with a stage of water higher than about four feet above low water. (171.) In April, 1870, the water rose to 16.15 feet above low water, and in October, 1869, it reached 12.20 feet above. (27.) In September, 1870, the dam for pier No. 5, and also that for the upper rest of the draw-pier being about half finished, were carried away by high water. (132, 157, 176, 234, 238.) It seems that during the fall of 1869, and during the entire year of 1870, there was an extraordinary high stage of water in the river. (56, 57.)

It is a well-authenticated fact in the case that the expense of putting in the coffer-dams was as great as that of constructing the masonry, if not greater, and that the risk was infinitely greater.—(89, 90, 183.) The whole masonry work at the contract price was $100,066.65, (258,) but the claimants built only eight dams complete, and a part of three other dams equal to one complete dam, hence the estimated price of one dam ($10,000) must be deducted on this basis, leaving as the price of the nine dams so built, $90,066.65. The masonry work actually put in by the contractors amounted to $76,344.47. –(328, 329.)

There was but one competing bid submitted for the work; this was the bid of Messrs. Reynolds & Co. (22, 23,) and they proposed to do the work of laying the masonry, including the construction of the coffer-dams, for $19.10 per cubic yard. They offered to do, also, the masonry work alone for $12.70, and to build six coffer-dams, varying from 18 to 12 feet in height, for $63,700. For the complete work, including dams and masonry, they proposed to charge $19.10 per cubic yard. The plaintiffs' average price for both kinds of masonry without the dams was $11.80 per cubic yard; the difference between the two bids was, therefore, $7.30, which would represent the price of the dams in the estimation of Reynolds & Co. At this rate the amount for the coffer-dams would be: $10,000 \times \$7.30 = \$73,000$; this was for six dams, or at the rate of $\$12,166.66\frac{2}{3}$ for each dam. But one of these dams must have been intended for the pivot or draw-pier, which seems to have required three dams, and hence these dams were equal to eight, and the average price amounted to $9,125 each. There is another view to take of this competing bid which results in substantially the same amount. For the masonry work alone they proposed to charge $12.70 per cubic yard, and for the work complete $19.10; this shows that they were willing to do the work connected with the dams and preceding the masonry work for $6.40 additional per cubic yard, or 10,000 cubic yards for $64,000 additional. This differs only a few hundred dollars from their separate bid for dams.

It will not be forgotten at this point that the depth of the water given by General Rodman was, for the common piers six feet, and for the draw-piers eight feet, or an average of, say seven feet.—(106.) These proposals were, therefore, based upon that depth of water, and the height of the dams estimated upon was to guard against any possible flood. Instead of the average depth of water being seven feet it was, for the five common piers, actually 11.44 feet. The water at pier No. 5 was over 20 feet deep.—(31,) and the average

depth of water measuring the whole width of the river at the place where the bridge was located, was nearly nine (9) feet. The depth of water is a most material circumstance in calculating upon the cost of coffer-dams.

Experts were called by the plaintiffs, and the principal officers in charge of the work were called to testify in behalf of the government touching the value of the work of putting in these coffer-dams. Mr. Abbott, (214,) an engineer of great experience in this kind of work, was called by the plaintiff. He was well acquainted with all the circumstances connected with the bridge in question. Major Stickney, of the Engineer Corps, who was in immediate charge of the improvement, for the purposes of this case made "estimates and plans as to the cost of construction of *proper* coffer-dams for that work."—(234, 235, 240.) These plans were produced and filed in the case, and were carefully examined and estimated upon by Mr. Abbott immediately preceding his examination, and his testimony was based mainly upon them. The court will observe that his estimates were made *to cover the cost alone of material and labor* (216) without reference to profits or to the risks and damages incident to swift water, floods, rafts, and the ordinary navigation of the river. His estimates in detail are as follows:

For Davenport Abutment - - -	$2,668 35
" Pier No. 1 - - - - - -	4,668 00
" Pier No. 2 - - - - -	5,592 00
" Pier No. 4 - - - - - -	6,495 00
" Pier No. 5. - - - - -	1,376 40
" Upper Rest - - - - - -	8,356 96
" Pivot - - - - - - -	4,842 56
" Lower Rest - - - - - -	3,698 19
" Island Abutment - - - -	3,780 98
	$41,478 44

He says that the usual percentage allowed or estimated for contingencies for such work is "from 40 to 100 per cent., dependent upon the probabilities of floods in the river."—(216.) "In case of unusual floods 40 per cent. would be a minimum allowance." The evidence is conclusive that the water was very high, and that the contractors were visited with many and violent floods, and it is therefore suggested that a liberal estimate should be taken for contingencies.

General Rodman (20) contemplated eight dams in his plan. For cost of masonry he estimated $24 per cubic yard. The whole quantity of masonry in the bridge as actually built was 8,575 yards; at this rate the cost would have been

8,595×24=	$206,280 00
This quanty of masonry is credited (258) to the plaintiff at	100,066 65
Therefore the sum of	$106,213 35

was for stone, cement, sand, and coffer-dams; but Rodman also estimated upon an average depth of only seven feet of water for the entire width of the river (106), but as before stated the average depth of water actually was 11.44 feet for the common piers, and 6.35 for the draw-pier (31); the increase of the expense from this great increase of the depth of water would much more than outweigh the cost of materials mentioned. The water at pier No. 5 was 20½ feet deep. (31.) But this estimate being for only eight dams, if we add for one additional dam at the rate mentioned, we shall have $106,213.35+13,276.66=$119,490.01 for the price of dams.

Stickney was in charge of the work for the United States. He was practically without experience in that sort of work when he was placed in charge of the construction of this bridge—(237.) He says (235, 240) that such dams as *he thinks should have been built* would have cost the sum of $18,466.16, and he allows about $4,000.00 for cribs and breakwaters, being in all about $23,466.16.

Scott, one of Stickney's assistants, (244, 245,) also an inexperienced man, on the basis of Stickney's imaginary dams as represented by his plans, estimated that dams, breakwaters, and protection cribs *should have cost* $25,079.54. It is an important circumstance to be remembered in weighing the testimony of Stickney and Scott, that they made their respective estimates long after this action had been instituted, and to be used in justification of their course of treatment of the plaintiffs; and furthermore, that such estimates were made; not concerning the *dams actually constructed* by the plaintiffs, but upon such dams as they, at that time, thought *should have been made* by plaintiffs; nor do they allow anything for accidents from navigation, or for floods; their figures are based upon the most favorable circumstances. *And the most remarkable fact is that those estimates were based upon a rise of the water of "three feet!"*—(235, 251, 252.) When they made such estimates they well knew that the plaintiffs had encountered great and numerous floods, and altogether worked under the most unfavorable and discouraging circumstances. In this connection it is proper to note that these contractors were stone-masons, and not carpenters skilled in the construction of coffer-dams; it should not be expected that they could, on a moment's notice, make the plans for dams and construct them with all the facility and skill of more experienced mechanics. And it was not their fault, but the fault of the Government, that they were precipitated into this branch of work.

The defendant's counsel undertook to present the case in behalf of the government as a claim for damages against the plaintiffs, and filed a counter-claim.—(9.) The proof submitted in aid of that aspect of the case, when considered in connection with the testimony previously adduced, has now become quite important and interesting. For the purpose of supporting this counter-claim, Stickney's bookkeeper stated an account between the plaintiffs and the

United States, (257, 258,) in which an attempt is made to follow the stipulations of the contract (8,) and the plaintiffs are charged with all the cash paid to them for work done prior to the date when they were ejected from the work, and with all the cash paid by the government after such expulsion "for completing the piers and abutments." The whole amount so paid by the defendant, for completing the work, as is there shown, was $86,655.24.

We know from Stickney how many dams he built, and we also know how much masonry work he did; by deducting the price of his masonry, we shall find the cost of his work and materials for dams, provided always that his statements are accurate.

He states in his deposition, when he was called for the defence, that he built three dams entire, and about two-thirds of another, to wit, the "dam for pier No. 3, *two dams* for pier No. 5, and a portion of the dam for the upper starling of the draw-pier."—(238, 239.) But of course he could not charge the plaintiffs with the extra dam for pier No. 5. As it appears, he was like unto the "foolish man which built his house upon the sand; when the rains descended and the floods came, and the winds blew and beat upon that" dam, it fell, "and great was the fall of it."—(238, 239, 249, 250.) Therefore, it cannot be said that he built more than two dams and two-thirds of a dam, and in this computation that number and no more can be fairly counted. We can also compute with some accuracy from his own testimony how much masonry work he did after he had ousted the plaintiffs. (See 104, 235, 258, 328, 329.) The whole quantity of masonry in the work was, in cubic yards - - - - - - - - - 8,595
Of this the plaintiffs did - - - - - 7,209

Leaving to be done by Stickney - - 1,386 yds.

We arrive at this result in this way:

The plaintiff completed - - - - -	4,155 yds.
Stone dressed not set - - - - - -	1,527
Equal quantity of backing - - - - -	1,527
Total - - - - - - - -	7,209

Of the 1,386 yards of masonry left to be done after the plaintiffs were driven off the work, only one-half was dressed.—(80.) The Government is entitled to credit for taking from the yard and setting in the work the dressed and unused stone left by the contractors in the yard, (1,527 yards,) and also an equal quantity of backing; and this, Stickney says, (82, 83, 235, 364,) was worth, say $2.63 per yard, and for dressing stone he allows $3.65 per yard.

The account may be stated on these figures, as follows:

For taking from the yard and laying in completed masonry, 3,054 yards, @ $2.63 -	$8,032 02
For dressing one-half of 1,386 yards, or 693, @ $3.65 - - - - - - - - -	2,529 45
For taking from yard and laying in completed masonry, the 1,386 yards, @ $2.63 - -	3,645 18
Total value of masonry work done by Stickney - - - - - -	$14,206 65

The whole work done by Stickney, including masonry and coffer-dams, as shown in the statement or account made by Powers and charged to the contractors, is the sum of - - - - - - - - - - $86,654 24
Deduct value of masonry as above given - 14,206 65

Balance - - - - - - - $72,446 59

He therefore paid out for building 2⅔ dams, and the excavating and pumping, &c., connected with them, all chargeable as he supposed to the contractors, the sum of $72,446.59. This basis of computation has been in the main fixed by the Court of Claims in its "findings of fact" in the first decision. (See also, 104, 82, 83, 235–6.)

If it cost Stickney this large sum to build 2⅔ dams, and to do the work connected with them, it will be an easy matter to ascertain how much it was worth for the plaintiffs to build nine dams.

In the first item of their claim the plaintiffs ask for compensation for the coffer-dams and for the labor and materials "in preparing the work necessarily connected therewith and preliminary to the masonry work." They built the coffer-dams before mentioned, and constructed the cribs and breakwaters or protections, and performed the work in making the excavation for the pier and abutments. (238.) Van Wagener says it was worth 33⅓ per cent. to "find those bottoms" (210). Scott estimated the excavation at $1,722.40, but Stickney's itemized amount of the cost of dam No. 5, built by him, shows that the excavation for that dam alone cost $1,022.97! (245.) Scott fixes the pumping at $3,082, and the preparation of the beds for receiving the masonry at $529. The Court will probably notice the fact that Scott and Stickney made no allowances for floods and accidents. They seemed to have made their calculations with sole reference to the most favorable circumstances. (234, 239, 240, 250, 251.) They allow nothing for risks or profits, and singularly enough *they allow for a rise of the water of only three feet.* (234, 235.) This last allowance appears to approach closely to absurdity when we remember that they well knew of the frequent and extraordinary floods which took place as before narrated, and that they were testifying as to the value, not of work to be done, but as to the value of work long since completed.

We have the exact figures showing the cost of one of the dams—(No. 5). In the account stated by the defendant's book-keeper between the contractors and the Government, (259), we find a credit of $6,187.25 for constructing the third dam at pier No. 5, and removing the first one; the witness, Stickney, gives the exact cost of most of the items going to make up the total expenditures about this dam, and the work and materials necessarily connected with it. The items are these (239):

Cost of dam	$4,583 69
Cribs and breakwaters	772 71
Pumping	510 00
Excavating	1,022 97
Total	$6,889 37

During the construction of this dam, the water was from *one to three* feet above low water (239), showing that the stage of water was as favorable as it could have been.

This dam was twice built by Stickney; the first was crushed by the force of the water (239), but it is fair to conclude that for this a large sum was paid out (Scott thinks about $5,000.00), and that both of these dams, with the other work and materials connected with them, cost between $11,000.00 and $12,000.00. This pier stood in deeper water than any other, the depth being about 20 feet below low water, although Stickney says (239), that when he built the dam the last time the water was only from 13 to 15 feet deep. The contractors built a larger part of this dam during the fall before and probably in more than 20 feet of water. They also built the dams for the piers, No. 2 and No. 4, in water 13 and 11.24 feet deep (p. 31).

The depths of water in which the claimant constructed dams are as follows:

Iowa shore abutment	
Pier No. 1	5.57 feet
Pier No. 2	13 "
Pier No. 4	11.24 "
Pier No. 5	20.5 "
Upper rest, average	8.76 "
Pivot pier	4.5 "
Lower rest	5.8 "
Island abutment	5 "

It may be added in conclusion, that it seems to be a remarkable proposition to assert that nine (9) coffer-dams of the dimensions required for this bridge, could be built and worked in the Mississippi river for $16,250.95, or about $1,800.00 each.

It is therefore submitted, that the amount originally claimed for the work and materials on this item of coffer-dams ($75,000.00) was not unreasonable.

II.

The second item of the claim also received the sanction of the Supreme Court; this part of the claim is for damages resulting to the claimants by reason of wrongful reductions in the dimensions of the piers after the contract had been made. On this branch of the case the plaintiffs claimed the sum of $33,600.

Rodman, in his plan for the bridge, contemplated five common piers, two abutments, and one pivot-pier, and gave the dimensions for each of the common piers as seventy-four feet and six inches in length and fourteen feet wide at the bottom; the dimensions of the pivot pier were given as four hundred and fifty-nine feet long, and fifty-six feet wide at the bottom.—(105, 106, 109.) The depth of

water, according to the profile of the river prepared for the information of those who were desirous of bidding, was, for the draw-pier eight feet, and for the common pier six feet.—(106.)

The common piers were to be fourteen feet wide across the bottom, and had a "batter" or inclination of one inch per foot; at a depth of six feet of water, the pier would have been, say, thirteen-and-a-half feet across the top. Warren, when he revised the plans, reduced these piers to a width of seven feet on top, and changed the "batter" to a half inch per foot, rendering the sides and ends of the wall nearly perpendicular. The draw-pier was, according to Rodman's plan, 56 feet wide at the bottom, with the same inclination as the common piers—one inch per foot. This, at the estimated depth, would have given a width on top of, say, 55 feet. Warren reduced the width on top to thirty-six inches and widened the batter to half an inch per foot.—(On this subject see generally, 51, 52, 54 75, 76, 88, 105, 106, 114, 151, 168, 202, 207, 208, 225, 226, 227.) The length of the pier was preserved. This great reduction in the cubical contents of the pier by this plan preserved substantially all the cut-stone work, and brought about the decrease in quantity by taking out the inside rough work or backing, which of course was composed of undressed material and rubble masonry, cement, gravel, sand, &c., &c., being the cheapest kind of material.

Warren, in his testimony, (225), undertakes to make a comparison of quantities in the two bridges, so as to demonstrate that the changes made by him could not have been of much consequence to the contractors. To do this, instead of taking Rodman's plans, as they were submitted to the bidder, for his basis, he took certain *red figures*, which appeared on these plans, which represented some proposed modifications which were never made (225, 226), and he bases his estimates on an average depth of water of six

feet, although the fact is that the average depth of water for the common piers where the bridge was located, was 11.44 feet.—(31,227,28.) At the draw-pier the depth was about seven feet. He undertakes to show that Rodman's bridge would have contained only 6,627 yards of masonry, placed at his (W's) location, (227, 233, 234,) but the fact is that it would have contained, as contemplated by Rodman, 9,557 cubic yards (106,235) for a "single-track" bridge. But in fact the drawings and diagrams made by Rodman were for a "double-track railroad," and this sort of a bridge, according to Rodman's plan, Warren concedes, would have contained 16,465 cubic yards of masonry. It is proper to say, in this connection, that much of Warren's statement, as he admits, is based on "hearsay."—(230.)

The plaintiffs called an expert, who examined the plans on file in court, and made a very elaborate statement as to the quantity of masonry. This may be found useful in the investigations.—(See Fraser's Tables, p. 220–3.) He shows that a bridge constructed according to Rodman's plan, at Warren's location, would have contained 15,632 cubic yards; the bridge, as built, actually contains (235) 8,595, making a difference of 7,037 cubic yards, which, according to Stickney was nearly all cheap work.—(234, 335, 208, 168.) To handle and place this masonry work would have cost $3.35=$23,573.95. At the contract price the contractors would have been entitled to receive, say $12 per cubic yard: 7,037 × 12=$84,444.

That the claim of the plaintiffs for loss growing out of this reduction in the quantity of masonry in the piers was a just claim, has never been seriously disputed by anybody. The officers themselves conceded that something should be allowed.—(51.42.76.) It may be difficult to arrive at the exact loss inflicted upon the plaintiffs through these changes; but enough is in the record to enable the Court to do equity between the parties. The great trouble is that

the location of the piers was greatly changed, and the entire bridge was moved down the river; the estimated depth of water turned out to be very inaccurate, and some of the piers stood in very much deeper water than it was supposed they would.

Several witnesses were produced by the petitioners, who were skilled workmen and experts in this kind of work. They have given their views as to the difference against the plaintiffs caused by this disproportionate decrease in the quantity of cheap work:

Curbough	(56)	41	per cent.
Bruce	(200)	30	"
Lloyd	(113)	33	"
Warner	(168)	30	"
Abbott	(208)	30	"
		5)164	"
An average, say, of		33	"

The whole quantity of masonry work done by the contractors amounted to $76,344.47.—(See findings of fact by the Court of Claims, (328, 329.) Thirty-three per cent. of this is = $25,448.15. Robertson says this reduction "took the cream right out of the job."—(151.)

This item of the claim is for the coarse, cheap work *included* in Rodman's plans, and *excluded* by Warren's. The Rodman plan was made up of three parts, say, one-third *dressed stone* and two-thirds *rough work;* whilst Warren's plan was made up of only two parts, to wit: one-half *dressed* stone, and one-half *rough* stone.

For every yard of *cut stone* in Rodman's plan, there were, say, *two* yards of rough work, upon which there was a profit

of $8.65. Now, about one-half of this rough, cheap work, was left out by Warren, and it is for this unfair reduction in the work—this one-third of cheap work cut out—for which this claim is made.

ESTIMATE OF LOSS BY REDUCTION.

The *draw pier* was reduced from 44 feet wide on top to 36 feet; a difference of 8 feet; equal to 20 per cent. The common pier was reduced from say, 12½ feet on top to (7) seven; a difference of 5 feet; equal to nearly 50 per cent. There was about half as much work in the draw pier as there was in all the others, so that the loss to the claimants would about equal 40 per cent.

The plaintiffs are entitled, in this estimate of loss, to the 7,209 yards paid for by the Court, and in addition thereto to the increase for the concrete, sand, grouting, &c., on the 3,054 cubic yards not laid up, being at least 25 per cent. of 3,054 cubic yards, equal to - - - 763 cub. yds.

This, added to the completed masonry	7,209	"
makes a total quantity of masonry of	7,972	"
From this deduct abutments as given by Weston, (30)	2,087	"
Work done by plaintiffs	5,885	"

Warren's plan left out 40 per cent. of the cheap work; 40 per cent of 5,885 yards is 2,354 yards. This 2,354 yards represents the cheap work omitted and cut out by the Warren plan, upon which the profit would have been $8.65 per yard (235), amounting to $20,362.10.

It is therefore submitted, that the claimants are entitled to recover, on account of the second item of the claim, the sum of $20,362.10

Assignment of Error.

The Court of Claims erred:

First: In awarding a less sum than $75,000.00 for the work and materials connected with the coffer-dams.

Second. In rejecting the second item of the claim, or the item based upon the unjust and unlawful reduction in the sizes of the piers.

Third. In refusing to allow and compute interest on the amount found due to the claimants.

Points and Authorities.

First. The Court of Claims refused to consider the testimony offered by the plaintiffs, to prove the value of their work and materials: not because it was not the best evidence which could be had, but because they should have employed book-keepers or adopted other adequate means to preserve more satisfactory accounts of their business, and "of the cost and expenses of the same."

The Court of Claims says:

> "We are of opinion that under the circumstances, if they intended to demand payment from the United States 'of the cost and expenses of the same,' to use the language of their protest, it was their duty to keep accurate accounts of the same, and produce them here.

> The details and amount of those costs and expenses were facts within their knowledge and control, and not within the knowledge and control of the United States." (Addl., R. 7.)

This to me is a new rule of evidence, and I cannot agree to its soundness in any case and especially in this one. The true rule is that the best evidence must be produced which the nature of the case will admit, and which is in the power or reach of the party. (*Cooke* vs. *Woodrowe*, 5 Cranch, 13; *U. S.* vs. *Britton*, 2 Mason, 474; *Tayloe* vs. *Riggs*, 1 Pet., 506; *Clifton* vs. *U. S.*, 4 How., 242.)

Even if such a rule as that adopted by the Court of Claims could be tolerated in any case, it could not be here. The contractors were stone-masons and not carpenters or book-keepers; stone work is measured after completion, and does not require the keeping of a particular account of the cost. The contract which the claimants made provided for the accomplishment of masonry work only. This has been fully established by the decision of this Court. It is fair to presume that the claimants did not come to their work provided with books of account, book-keepers and accountants, to keep a detailed and systematic account of the "costs and expenses" of the solid masonry; such provisions would have been wholly useless. The agents of the Government forced upon them this difficult and dangerous work of constructing coffer-dams, which seems to require such very particular accounts; it was not the work they undertook to do. Hence, if either party was bound "to keep accurate accounts of the sam eand produce them here" it was the defendant.

The Court of Claims appears to have been led into declaring this extraordinary rule of evidence, by considering and weighing documents which are more objectionable—as evidence—than is the rule itself. The Court, as a foundation for the rule, gives the following:

"General Warren wrote as follows to General Rodman: As you were the officer who executed the contract on the part of the United States, will you please inform me if there was anything implied in any way which justifies the protest made by Messrs. Harvey & Livesey. It seems to me clear that they having made all the preparation for putting in the coffer-dams, and only entering their protest against doing so just as they were going at the work, shows that this is an afterthought of theirs, and not only not according to the wording of the contract, but not according to their own understanding of it at the time it was made.'

"To this General Rodman replied: 'My understanding of the contract at the time it was signed was that Messrs. Harvey & Livesey were to put in the coffer-dams, prepare foundations, and do and furnish everything except the stone, sand, and cement necessary to the completion of the piers and abutments, and I was then and am now fully impressed with the belief that they so understood it.'

"The opinion of Major Edson, who drafted the advertisements and drew the written contract, was also obtained to precisely the same effect. The papers were then referred to the Judge-Advocate-General, who replied: 'Upon the contract and the statements of Generals Warren and Rodman, I can come to no other opinion than that which they have arrived at in regard to the obligation of the contractors to build the coffer-dams, pump them out, &c., as incident to the erection of the piers and abutments. * * * Any claim which they may hereafter make for damages or additional compensation on account of being required to perform the work against which they have protested can be met and properly defended when formally presented or prosecuted."

"This opinion was communicated to General Warren, with a letter, in which it was said: 'The Secretary of War approves your action in permitting the contractors to go on with the construction of the piers after they had protested against your decision and action in relation to the coffer-dams, &c.; but that protest will not be recognized by you in any way as a condition under which the contractors continue

work; nor is it to be considered as forming any agreement or understanding between yourself and them, nor as having been assented to in any manner or degree on the part of the United States.'

"The substance of this was communicated to the claimants, and down to the day when the work was taken from them by the United States they did work on the coffer-dams and in preparation of beds for the masonry with knowledge that their claim for compensation for it would be disputed and could only be recognized at the end of a law suit."

The following suggestions are made as being pertinent to the above extract from the opinion of the court below:

1. Gen'l Rodman's letter (R., p. 278) was never offered as evidence in the case; if it had been, it could not have been received. It was written long after the contract was made, and by a person who really had but little to do with it. It was written in reference to a suggestive letter of another officer.

2. The "opinion" of Edson was never offered in evidence; it is wholly improper and impertinent, and could not be received as evidence. (See Edson's "opinion," p. 311.) In this "opinion" Edson says:

> "I drew up *the rough draft of the contract* which was made with them."

It is not very important whether this last assertion be true or false, but it may be interesting to compare it with the statement of Gen'l Rodman's clerk, who was sworn and examined as a witness in the case. The witness Waters says (p. 58):

> "*I wrote a rough copy of the contract*, and it was given to Harvey & Levisey for their examination and approval."

The court below, it seems to me, gave too much importance to documents which found their way into the record

without an opportunity to the opposite party to object. Under the peculiar practice in the Court of Claims, such papers may be found in nearly all cases, yet it will not be seriously argued that this fact legalizes them and makes them competent evidence.

It is, therefore, suggested that the evidence relied upon by the court below for the foundation of its new rule, is as unsound as the rule itself.

In connection with the assertion of the court below in support of this rule, that "the details and amount of those costs and expenses were facts within their knowledge and control, and not within the knowledge and control of the United States," it may be important to recall a provision of the contract, which is in this language (7.):

> "The character of the work to be daily inspected as it progresses, by such officer or other person as the commanding officer of the Rock Island Arsenal, or other authority appointed by the United States may designate, such inspector to have full authority to give any direction with regard to the character or manner of conducting the work."

Even upon the theory urged by the army officers at the time, the "details and amount of those costs and expenses were facts within their knowledge and control" as completely, if not more completely, than in the knowledge and control of the contractors.

The evidence offered by the plaintiff, it seems to me, was therefore competent and proper, and the best within their reach or control. We may concede that experts in book-keeping and accounts, might have adopted a more perfect and systematic plan for preserving evidence of the cost of this work and the materials in detail; but the fact is that the plaintiffs did not do it; shall they, for this reason, forfeit to the Government the value of their work and materials now in use by the Goverment?

Second. This Court held, when this case was first here, that the plaintiffs had a right to recover such damages as they had sustained by reason of the reduction in the sizes of the piers. But the Court of Claims rejected this item because, as the opinion declares, the item had been estimated for by that Court and included by it in the original judgment.

When the judgment from which these appeals are taken was rendered, only one of the judges was present who sat when the original opinion and judgment were rendered, and that was the Chief Justice; Mr. Justice NOTT was absent.

The court below in this case on this point says: (Adl., R. p. 13.)

> "The truth is, and we cannot shut our eyes to it, that the opinion shows that this court when it entered that judgment in the common-law suit did not do what the contract called for; it did not state an account between the United States and the claimants, charging them with the entire cost of completing the work and crediting them with the contract price of it, but it allowed them their full profits on a certain portion of the work, without taking into consideration the losses which they might have suffered in doing the rest. If the record is carefully examined it will be found that this is all the court assumed to do. The fifth item in the bill of particulars was—
>
> "For constructing 4,400 cubic yards of masonry at, say, $12 per yard, $52,800."
>
> The court in the finding above cited finds that the claimants had done work under contract, "the particulars of which are as follows:" and among the particulars of the work done under the contract were the 1,527 cubic yards of stone which were never put into the wall by the claimants. The court did not regard this as work done by the United States, and the provision of the contract now invoked, which relates exclusively to work done by the United States, has no bearing upon it.

If this allowance made to the claimants in the former judgment is not an allowance of profits on work not done by them, we are unable to understand what such profits are; and if it is not the identical thing which the claimants are now seeking to recover, we are equally at fault.

It is worthy of remark, in this connection, that the record contains a statement of account between the parties, in which the amount paid by the United States on the vouchers for completing the piers and abutments, after they took possession of the work, was $86,653.24. The account as balanced shows an indebtedness by the claimants to the Government of $33,681.35. Making every allowance which could possibly be claimed for the cost of the coffer-dams after the Government took possession, the state of this account would still completely negative the theory on which the claimants try to maintain the rightfulness of the former judgment.

From this it appears that the claimants have already received some $13,000 as profits on masonry not constructed by them. Being allowed and paid to them under a judgment of this court not appealed from and not reversed, it cannot be recovered back. But the court, sitting as a court of equity, is certainly entitled to take the fact into consideration when asked, under the mandate of the higher court, to award the claimants a further sum for the same thing."

If the Court of Claims, in making up its first judgment allowed the claimants $13,000, or any other sum for profits on this masonry not constructed by them, I am "unable to understand what such profits are," and that court, *at that time*, evidently labored under a similar difficulty. The language used in the opinion in the original cause, it seems to me, declared, in terms quite unmistakable, that it could not and did not make such an allowance. The court, in that opinion, says:

"But the question here presented is one of authority. Had the officer in charge of the work the power, under the contract, to make the alteration complained

of? Discarding, as in the former part of this opinion, the preliminary negotiations of the parties, and looking alone to the written argument, it seems clear that the claimants conceded this right when they executed the contract. By the very words of the agreement they bound themselves "to construct the piers and abutments *in accordance with such plans and specifications as may be fixed by proper authority acting for the United States.*" The right of the United States to fix the plans and specifications for the piers and abutments is not disputed, and the question now to be decided is whether or not that right was exhausted when the specifications and drawings were exhibited to the claimants before they sent in their proposals for the contract. To hold that it was, would be to defeat the purpose of the—after written—contract, and render nugatory its leading stipulations. Such was not the intention of the parties, nor will the language employed in the contract bear any such interpretation. It clearly has a future signification; and the claimants have conceded the right to the United States to fix the working plans and specifications; they cannot now claim its exercise worked a breach of the contract, for which the defendants are considerable in damages."

(8 C. C. R., 507; see, also, dissenting opinion of Judge Nott on this branch of the case, p. 513.)

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This Court seems to have fallen into the same error in which the Court of Claims, in the opinion just cited, is said to have been involved. This Court, in speaking of what the Court of Claims had done in the case, says: "*It had rejected item 3*, because that contract gave the Government power to reduce the dimensions of the piers and abutments." (105 U. S., 689). Item 3 specifies the claim for damages growing out of the reductions in the sizes of piers (4).

If further citations be necessary to show that the claimants have not been paid for these damages, reference may be made to the items allowed and included in the judgment by the Court, as appears from its findings (328, 329), and in

the opinion referred to (8 C. C., 514). The Court, in concluding the opinion, says:

> "The other claims for damages under the second, *third*, fourth, seventh and eighth items in the petition, are not sustained, and are therefore disallowed." (511)

It will be observed that in the opinion of the court below, in rendering the judgment appealed from, as above quoted, the 5th item of the claim (for work completed), as set out in the *original* petition, is given in full. It may be that that court overlooked the fact that an amendment was made by which that item was changed both in language and amount. The amount claimed on this item originally was only $52,-800.00; by the amendment that amount was increased to $82,000.00 (See. 4 & 9). If this amendment was overlooked it may have led that court into an error. The original allowance by the Court of Claims was:

For the value of work actually done - - -	$76,344 47
Less cash received - - - - - -	54,105 98
Balance due for work - - - - -	$22,238 49

(See 8 C. C. R., 511, & R. 528–9.)

The extent of this branch of the claim and its character are well stated in a letter of protest by the claimants. The contractors (51), on September 20, 1870, by letter, complain that the reduction in the sizes of piers, diminishes the number of cubic yards of *cheap* work at least 3,400 cubic yards; at the rate of $8.65 per yard, this amounts to the sum of $29,410.

The measure of damages adopted by the Court of Claims in the first judgment was correct. The rule is established by the contract itself and by the cases. The contract, in case of *default*, established this rule; it provides:

"That if any default shall be made by the parties of the first part in the performance of their work specified in this contract of the quality, and at the time and places therein provided, that then in that case the United States shall have the right to take entire and exclusive charge of the work, and to complete it in accordance with the conditions prescribed in this contract, charging us with the entire cost of completing it, and crediting us with the amount per cubic yard heretofore stipulated to be paid us for the completing of the work."

This rule is well settled. See the following:

Dermot vs. *Jones*, 2 Wall., 1;
Adams vs. *U. S.*, 1 Court of Claims, 106;
Speed vs. *U. S.*, 7 Court of Claims, 93; 8 Wall., 93;
Speed vs. *U. S.*, 2 Court of Claims, 441;
Howard vs. *R. R.*, 13 How.;
Morterlon vs. *Brooklyn*, 7 Hill, 512.

The Court was as much bound to give plaintiffs credit for the 1,527 yards of backing with the 1,527 yards of dressed stone (less the cost of putting it in completed masonry), as they were to give them credit for the "backing," which went in with the stone set in place; it would be just as fair to give credit for the *latter at the cost*, without reference to the contract price, as to allow only for "dressing" or "receiving and handling." The United States violated the contract, and the *contract rule* must be applied. (*Dermot* vs. *Jones*.)

On the first trial the Court did not allow as much as it should have allowed. This will appear from the following statement of account:

The account between Harvey & Livesey and the United States, for work and materials, as it should have been stated by the Court of Claims on the first trial:

THE UNITED STATES,

To HARVEY & LIVESEY, *Dr.*

1870.			
Oct. 7.	For 1,556½ cubic yards masonry, complete, in pivot pier, at $13 per yd.,	$20,234	50
"	For 2,599 cubic yards masonry, complete, in other piers, at $11 per yd.,	28,589	00
"	For 1527 cub. yds. stone dressed, not set, less $2.63 per yd. for setting it, one half at $13 per yard and the other at $11 per yard—say $12 - - - - - -	14,308	00
"	For 1,527 cub. yds. "backing" for the item last above, less $2 for setting it—one-half at $13 and one-half $11 per yard—say $12 - -	15,270	00
"	For 763 cubic yards of masonry, being 25 per cent. of the above, allowed for cement, sand, &c.—one-half at $13 and one-half at $11—say $12 per yard - - - - -	9,156	00
"	For receiving and handling stone, as allowed by the Court in last item -	996	97
		$88,554	47
	Credit payments - - - - -	54,105	98
	The court, for work actually done, should have allowed - - - - - - - -	$34,448	49

The court below, it is submitted, was in error in deciding that the claimants had already been paid for the damages on this item of the claim set forth.

Third. The only remaining subject is that of *interest.* It is submitted that under this special statute (343) the claimants are entitled to interest. The statute requires that such a judgment shall be rendered as "*justice and right between the claimants and the said Government may require.*" On the 7th of October, 1870, the contractors were wrongfully ejected from the work; whatever sum of money be found due to them *now*, was due to them *then;* and that sum has been due to them for more than fourteen (14) years. Can this Court do these claimants "justice" without allowing them interest? Even with interest, full justice cannot be done.

When the question arose in September, 1869, as to the party upon whom rested the obligation to bear the expense of building the dams, the officer in charge induced the contractors to proceed with the work upon the promise that he would cause the question to be submitted to the Attorney-General.—(98, 99, 459.) Instead of this course the military authorities assumed to decide the question themselves (450) and, of course, decided to sustain Warren's theory. It was too late then for the contractors to recede. The result has been this litigation, extending from the date of filing the first petition in this Court, December 14, 1870, up to this time. During all that time the Government has unlawfully detained and used the money which belonged to the petitioners.

This case is, by the act of Congress, taken out of the general rule of law regulating proceedings in the Court of Claims. If this Court in its "judicial discretion" shall be of the opinion that justice cannot be done without an allowance of in-

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Office Supreme Court U. S.
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CLERK.

In the Supreme Court of the United States

OCTOBER TERM, 1884.

JAMES W. HARVEY AND JAMES LIVESEY, appellants, *v.* THE UNITED STATES. } No. 625.

THE UNITED STATES, appellant, *v.* JAMES W. HARVEY AND JAMES LIVESEY. } No. 626.

BRIEF FOR THE UNITED STATES.

In the Supreme Court of the United States.

OCTOBER TERM, 1884.

JAMES W. HARVEY AND JAMES LIVESEY, appellants, *v.* THE UNITED STATES.	No. 625.
THE UNITED STATES, appellant, *v.* JAMES W. HARVEY AND JAMES LIVESEY.	No. 626.

BRIEF FOR THE UNITED STATES.

These are cross-appeals.

This case has been here before on an appeal by the claimants (105 U. S., p. 671).

The litigation arises upon a contract between the United States and the claimants, dated 1st June, 1869, whereby the latter undertook to construct for the former the substructure of masonry of a bridge to span the river Mississippi and connect Rock Island with the city of Davenport, Iowa.

Under the original petition, filed on the 14th Decem-

ber, 1870, the claimants had judgment for the sum of $42,306.49, which has been paid by the United States to the claimants.

But the claimants contending that the said judgment was not commensurate with their whole demand, owing to a mistake in the contract, which the Court of Claims had no jurisdiction to remedy, applied to Congress for relief, and succeeded in obtaining the passage of the following act:

CHAP. 297.—AN ACT for the relief of James W. Harvey and James Livesey, of the firm of Harvey and Livesey, of Wisconsin.

Be it enacted, &c., in Congress assembled, That the claim of James W. Harvey and James Livesey for alleged labor done and materials furnished under their contract with the United States for the building of the masonry work for the piers and abutments of the bridge across the Mississippi River from Rock Island to Davenport, Iowa, bearing date June first, eighteen hundred and sixty-nine, be, and the same is hereby, referred to the Court of Claims for hearing and adjudication; and to that end jurisdiction is hereby conferred on said court to proceed in the adjustment of the accounts between said claimants and the United States, as a court of equity jurisdiction, and may, if according to the rules and principles of equity jurisprudence, in its judicial discretion, reform said contract and render such judgment as justice and right between the claimants and the said Government may require. (August 14, 1876, 19 Stat., 490).

On the 30th August, 1876, the claimants filed a petition invoking the enlarged jurisdiction of the Court of Claims (p. 331, old R.), and on the 5th February, 1877, (p. 337, *ib.*), and 23d March, 1878 (p. 340, *ib.*), the claim-

ants filed amended petitions, all of which, both original and amended, were dismissed by the court.

From this decree of dismission there was an appeal to this court, resulting in a reversal of the said decree, this court being of opinion that there was a mutual mistake in framing the contract in such wise as (1) to bind the claimants to construct the coffer-dams required in building the masonry and prepare the beds to receive the foundations of the masonry, and (2) in binding them to execute the work upon any change of the plan upon which the claimants made their bid that the United States might see fit to adopt afterward.

In other words, this court held that the claimants were entitled to recover the value of their work, labor, and materials in and about the building and constructing of certain coffer-dams and preparing the beds for the foundations of the masonry, and that the claimants were entitled to be made whole for any loss that had come to them in consequence of the diminution of the size of the bridge piers involved in the departure from General Rodman's plan by General Warren, who succeeded him in charge of the work, upon which plan of General Rodman the claimants' bid was based. This court also held that the question of interest on the claimants' demand was still open.

The cause was accordingly remanded to the Court of Claims, to be dealt with in the three particulars mentioned in conformity with the opinion of this court.

The cause was reheard by the Court of Claims under the mandate of this court, and on the 30th April, 1883, a decree was entered awarding the claimants $16,250.95 (new Rec., p. 17), as to the coffer-dams and the work

therewith necessarily connected, and dismissing the petition as to all other items of claim (*vide* opinion of the court, p. 4, new Rec.).

From this decree, as we have seen, both parties have appealed.

CLAIMANTS' APPEAL.

THE ALLOWANCE FOR COFFER-DAMS.

The first ground upon which the validity of the decree is challenged by the claimants is that the sum awarded them by the court below for constructing coffer-dams and doing the work necessarily connected therewith is inadequate, and much below what the evidence warrants.

As it is in respect of this same item of claim that the Government has appealed, alleging for error that the court below did not dismiss the claimants' petition in that behalf, and as a discussion under either appeal of the soundness of the decree in the matter of the said item necessarily involves a discussion of its soundness under the other appeal, both appeals will be discussed together in this particular.

On the 13th September, 1869, the claimants formally notified the defendant, by a letter addressed to General Warren, the engineer in charge of the work, that they were ready to build the piers and abutments under the contract, and requesting the defendant to construct forthwith "the requisite coffer-dams, exhaust the water therefrom, and prepare the bed for said piers and abutments where necessary for the commencement of said work" (old Rec. p. 13).

Two days afterward, upon the refusal of the Government to accede to their request, the claimants formally protested against such refusal, at the same time giving notice that they would at once proceed "to build said dams, pump the water therefrom, and prepare said beds," and "*hold the United States for the payment of the costs and expense of the same*" (old Rec., pp. 13, 14).

In order that the work might not be delayed, General Warren consented that it might go on until the matter in difference could be referred to the Attorney-General, said consent, however, to be in no sort considered as an acquiescence in the interpretation of the contract insisted upon by the claimants (old Rec., p. 14).

The very day the protest was made General Warren addressed a letter to General Rodman, who was the engineer in charge when the contract was made, and executed it in behalf of the Government, asking to have his interpretation of the contract upon the point of dispute, to which General Rodman replied promptly, saying that he understood that the claimants were to build the coffer-dams, &c., and that he fully believed such was their understanding of the contract, (old Rec., pp. 277–8).

In addition to this, the Judge-Advocate-General, to whom the matter was referred, gave an opinion that the claimants were bound to build the coffer-dams, &c. (Old Rec., p. 281). He concludes his opinion with this language: "Should they [the claimants] continue the work, any claim which they may hereafter make for damages, or additional compensation, *on account of being required to perform the work against which they had protested, can*

be met and properly defended when formally presented or prosecuted" (pp. 281–286, 312).

"The substance of this was communicated to the claimants," say the Court of Claims in their opinion presenting the reasons on which the decree appealed from is based, "and down to the day when the work was taken from them by the United States they did work on the cofferdams and in preparation of beds for the masonry, *with knowledge that their claim for compensation for it would be disputed and could only be recognized at the end of a lawsuit"* (new Rec., pp. 7, 8; old R., pp. 286, 312).

Here then were the claimants, on the one hand, protesting that a large and costly part of the work, necessarily involved in building the substructure of the projected bridge, was not within the terms of the contract, and protesting that they would proceed to perform their contract, and, at the same time, and as was unavoidable, do and perform the disputed work, and "hold the United States for the payment of the costs and expenses of the same," and the Government, on the other hand, insisting that the disputed work was within the purview of the contract, and the language of the contract, as it stood unreformed, giving full support to that interpretation—in a word, a predicament of open and avowed antagonism between the contracting parties.

It abundantly appears from the record that the claimants had been frequently engaged in the construction of important and extensive works, and were of large and varied experience in business, and yet they would have us believe that, with a full knowledge of the hostile attitude of the Government toward them touching the disputed work,

they nevertheless entered upon and carried forward that work, until what they did of it amounted to the alleged value of $75,000, without keeping any account of the items which make up that large sum.

That such men, nay, *that any men*, dealing at arm's ength and in the face of radically variant views of the other contracting party, should have pretermitted the obvious precaution of keeping some sort of an account of this extra work, *compensation for which they knew could be obtained only at the end of the law, is so improbable*, that their failure to produce an itemized statement of claim *compels* the inference of a *suppressio veri*.

And this omission of the claimants, *if omission it be*, is all the more remarkable from the fact that in November, 1869, they rendered an account to the Government containing an item of $1,800 *for lumber and iron for coffer-dams* (R., p. 286), showing that up to that time they had kept some sort of an itemized account of this extra work, which was precisely what Major Stickney did in the matter of Dam No. 5, (p. 239).

When, therefore, the claimants came before the court below with the conjectural, speculative estimates of witnesses who did not profess to know the actual cost, or any more than the general character of the work to which their testimony was directed, the court, *in odium spoliatoris*, refused to entertain the evidence; but finding in the record evidence of the same character, but which it deemed more trustworthy, which had been adduced by the defendant to countervail the claimant's evidence, and for that purpose only, should it be considered, the court, instead of dismissing the petition, as it should have done, we humbly

submit, proceeded to give the claimants a judgment on that evidence, which, we hope to show further on, was error.

That the court were right in refusing to entertain the claimant's evidence, as to the extra work, we think is manifest.

In Clunnes *v.* Pezzy (1 Camp., 8), which was an action for goods sold and delivered at the suit of a liquor merchant, the only evidence respecting the goods was that of his servants, who spoke to the delivery of several hampers of full bottles at the defendant's house, but as to the contents of the bottles they were altogether ignorant. Lord Ellenborough directed the jury to presume that the bottles were filled up *with the cheapest liquor* in which the plaintiff dealt, viz, porter, and they awarded damages upon that scale accordingly.

This case was followed by the exchequer in Lawton *v.* Sweeny (8 Iur., 964), which was an action for money lent; and the only evidence in support of the case was that of a witness who saw a bank note pass from the plaintiff to the defendant; and it was held proper to direct the jury to assume the note to have been of the *smallest denomination issued.*

From the time of the case of Armory *v.* Delamirie (1 Stra., 504, S. C.; 1 Sm. L. C.) down to the present day it has been the law that "if a man, by his own tortious act, withhold the evidence by which the nature of his case would be manifested, *every presumption to his disadvantage will be adopted,*" cited Brown's Max., p. 939.

In White *v.* Lady Lincoln, and the Duke of New Castle *v.* Kinderley, 8 Ves., 363, Lord Eldon refused to

allow a large credit upon loose and indeterminate evidence coming from a quarter where particular and regular accounts should have been kept. To the same effect are the cases of The Attorney-General *v.* Fullerton, 2 Ves. & B., 264, and Lupton *v.* White, 15 Ves., 432.

In Lumley *v.* Wagner, 1 De G. M. & G., 634, the lord chancellor treated as true an *affidavit* of the contents of a letter which had been called for but not produced.

But let us give special attention to the testimony on which the claimants' demand touching the coffer-dams is founded.

They have examined two witnesses as experts upon this item, F. D. Van Wagenen (old Rec., p. 209) and James E. Abbott (old Rec., pp. 206, 214).

Van Wagenen is a contractor, and says he is acquainted with the building of coffer-dams.

It seems he had a partner by the name of Haroun, who was very desirous to put in a bid for the masonry of this bridge, and it was at his instance that Van Wagenen made estimates (p. 211). According to these estimates, which he tells us were prepared a month or forty days *before* the contract was awarded claimants (p. 211), and hard upon three years before the date of his deposition (p. 212), it would *cost* $36,000 to build the necessary coffer-dams, as well those built or finished by the Government as those built by the claimants (p. 210).

And in considering what this witness says as to cost we are to keep in mind that his figures were necessarily founded on the plans of General Rodman, of *which all he knew was derived from hearsay* (p. 213), which indeed, being merely "*trial plans*," as Major Stickney tells us (R., p.

75), were changed by his successor, General Warren, in the article of a *most material diminution of the quantity of masonry*, bringing with it a most material contraction of the sizes of the coffer-dams required in building the masonry (R., p. 227), and making a difference, in Major Stickney's opinion, of $11,797.34 in the total cost of the dams (R., p. 236), which change of plan is, indeed, one of the claimants' grievances in this suit for which they demand damages against the Government.

This witness frankly tells us that he is totally ignorant of the kind of coffer-dams actually built, except from hearsay (p. 212), nor does it appear that he ever visited the work while it was in progress. We may, therefore, give this witness credit for all that is claimed for him, and yet be compelled to discard his testimony because given upon *data* widely variant from the conditions of the case at bar.

The other witness, Abbott, is not more satisfactory. When asked if his estimates of the cost of coffer-dams "*are upon the basis of those made by Harvey & Livesey as to dimensions*," he says, contemptuously, it would seem, "*My estimates are based upon what I, as an expert, believe to be necessary in each and every case, to resist the force of the current and other phenomena developed in the case in question*" (p. 219). And, as if in one and the same breath to display his bias and over-confidence, and before being thereto provoked by cross-examination, he tells us, after giving us his results, that "this is all based on an absolute calculation *which I propose to stand by—a question of reasonable cost*" (p. 216). This gentleman, not to do him injustice, is a civil engineer, and was, at the time he testi-

fied, engaged in constructing a railway from New York to Council Bluffs (p. 214), and says he has built as many as fifty coffer-dams.

The learned counsel opposite refers to the familiarity of this witness with the work in question. But in what did that familiarity consist?

It is true he was at Rock Island in the summer, autumn, and spring of 1869, and, he says, was familiar with the work up to the summer of 1870. But how familiar? Why, to use his own words, "*as a general observer of the work*" (p. 218).

It is to be noted that during this period of miscalled familiarity with the work, this witness was engaged as a contractor in building the Rockford, Rock Island and Saint Louis Railroad, and therefore it is not to be supposed that his own affairs allowed him to be more than a very superficial, or, if you please, "*general*" observer of what the claimants were doing. At any rate, his observation, if it amounted to anything, has certainly not stood him in very good stead, for he expressly tells us that his speculations, or so-called calculations, which we are asked to treat seriously as *testimony* here, were not based on the facts of the case, but on what he preferred to evolve from his own consciousness (*supra*). It was not such coffer-dams as *were built*, but such as he thinks *ought to have been built*, that he has in his mind's eye. That a witness who comes into a case with the spirit of a partisan, which he cannot even repress through the examination-in-chief, and who is, at the same time, unconfined by the limitations of the facts to which his speculations are supposed to be addressed, should deal roundly, is not, perhaps, to be won-

dered at; any more than that the court below should have refused to make so wild speculations the basis of judicial action. This extravagance of this witness's estimates appears more plainly when he ventures upon details. For example, his estimate of the cost of pumping out the dam at the Davenport abutment is $476.77 (p. 219), whereas the two Government engineers employed on the work, Stickney and Scott, say, the one, that the cost was $180 (R. p. 240), and the other $216 (p. 244). So with the excavating at this abutment, Abbott puts the price at $504 (R. p. 219), while Scott makes it $153.16 (R. p. 245).

At best the testimony of experts is very unsatisfactory. Says Mr. Taylor, in his work on evidence:

> Perhaps the testimony which least deserves credit with a jury is that of *skilled witnesses*. These gentlemen are usually required to speak, not to facts, but to *opinions;* and when this is the case it is often quite surprising to see with what facility and to what an extent their views can be made to correspond with the wishes or the interests of the parties who call them. They do not, indeed, wilfully misrepresent what they think, but their judgments become so warped by regarding the subject in one point of view that, even when conscientiously disposed, they are incapable of expressing a candid opinion. Being zealous partizans, their belief becomes synonymous with faith as defined by the apostle, and it too often is but "the substance of things *hoped for*, the evidence of things *not* seen." To adopt the language of Lord Campbell, "skilled witnesses come with such a bias on their minds to support the cause in which they are embarked that hardly any weight should be given to their evidence. (Evidence, Vol. 1, Sec. 50.)

But to be of any value at all, nay, to be admissible, it should be founded on a definite state of facts and not upon the loose conjectures or fancies of the expert himself. In other words, there must be a determinate state of facts, whether agreed or hypothetical, upon which the expert's opinion is asked. *But he cannot make up the case himself.* Here we have the opinions *without the case.*

In the case in hand it is not pretended that the experts Van Wagenen and Abbott knew anything about the bed of the river where the bridge piers stand or knew the kind of coffer-dams that were used. We therefore submit that this testimony is not competent for any purpose.

At this point we call attention to the great stress laid by the learned counsel opposite upon the competing bid of Reynolds & Co. (Bf., p. 7), *as an instrument of evidence.* We submit that it has no such effect in the case, and that it would have subserved the interests of justice much more if one or all of that firm had been examined as *witnesses* instead of their bid being used as a basis for some very indeterminate and unsatisfactory speculations. We respectfully submit that this paper must be discarded from the case.

As a coffer-dam is more costly the deeper the water in which it is placed, a very labored attempt is made here to show that the water was deeper than General Rodman had allowed for in his plans. But as this coffer-dam work is not *contract work,* what does it signify what depth of water General Rodman had in view when he was making his plans?

It is stated upon the supposed authority of the evidence that the average depth of water was "*actually* 11.44

feet" and that the "*water* at pier No. 5" was 20 feet deep. But when we consult the page of the record referred to (p. 31), we find that the learned counsel is under *a complete misapprehension.* The witness whose testimony is relied on is Weston, one of the engineers on the work, but called by the claimants. The average 11.44 feet given by him represents the depth of the *foundations of the piers below low water.* Now, that is a very different thing from the depth of the water, for the *foundations of several of the piers* were laid *considerably below the bed of the river.* Take, for example, pier No. 5. The water at that pier is about 12 feet deep. The witness Addison M. Scott, an engineer employed on the work by the Government, says: "*At pier No. 5 the river bed is twelve* (12) *feet below low-water mark*" (old Rec. p. 248), while at the same time the *foundation* of the pier, he tells us, is 7 or 8 feet below the bed of the river. In estimating the cost of the coffer-dam, within which that pier was built, the additional depth of 7 or 8 feet representing the excavation to reach the ledge which lay that far below the bed of the river, on which bed, and not ledge, the coffer-dam rested, *does not enter into the calculation.*

It is obvious enough, therefore, that this calculation of the learned counsel to reach the average depth of water at the sites of the piers is fallacious and misleading. It is very clear, then, that he, and not General Rodman, is egregiously in error, and that the calculations, on which he relies so much, based on the average depth of the piers, *and not the river,* must be rejected as radically defective.

Again, in presenting his case the learned counsel more than once directs the attention of the court to the fact that

the excessive estimates of Mr. Abbott do not include the usual allowance of from 40 to 100 per cent. for *contingencies*. But we submit that estimates in this case should be *retrospective and not prospective*. What were probabilities or possibilities when the work was entered upon are no longer such. We are now dealing with actual facts and occurrences, and founding our calculations on them, as we must, it is entirely out of place to refer to probabilities or contingencies as elements of the problem for solution. If there were floods, we know exactly what they were. If dams were carried away by currents they could not resist, we know, or, at least, *we ought to know, and would know, if the claimants had done a proper part by the Government*, the extent of the damage suffered.

We confess, therefore, we do not know what counsel means when he urges upon the court (Brief, p. 9) to make the claimants a liberal allowance for *contingencies*. He is here claiming upon a *quantum meruit* and a *quantum valebat, i. e.*, to recover what he reasonably deserves to have in recompense of his labor, and what his materials furnished are reasonably worth. But he wants more; he wants recompense for what never was done by him, but what might possibly or probably have been done by him. This he cannot have.

We have already shown the serious error of the counsel opposite in taking as a basis the average depth of piers instead of the river at the sites of the piers. We now call attention to another error in his figures which may mislead.

In trying to get some sort of a foundation to support this claim for coffer-dams, he says the whole outlay of the

Government on the work, after it assumed charge of it, including masonry and coffer-dams, was $86,654.24, and from this he deducts what he gives as the value of the masonry, and what remains he sets down to the cost of coffer-dams, excavating, pumping, &c., wholly forgetting that out of this sum is also to be deducted the large sum of $6,187.25 by which the claimants are credited as the cost of the second coffer-dam for pier No. 5 "*and removing first dam*" (*vide* Powars's statement of account, old Rec., pp. 258–9; also Bf., p. 14, *where this credit is referred to*).

It thus appears that the counsel not only takes as the cost of coffer-dams, *pumping, excavating, &c.*, a sum which includes the cost of a dam by which the claimants have been credited, but which also includes the *whole expense of removing the defective dam in the room of which the credited dam was built.*

Again, the learned counsel seeks to discredit the estimates as to the cost of coffer-dams of Stickney and Scott, engineers employed on the work by the Government, by charging them with basing their calculations upon a rise of water of only three feet (Bf., p. 10). The counsel says that this allowance for three feet rise of water "*appears to approach closely to absurdity,* when they well knew of the frequent and extraordinary floods which took place as before narrated, and that they were testifying as to the value not of work to be done, but as to the value of work long since completed." (Bf., p. 13.)

We should have supposed that the learned counsel would have taken special care to proceed on correct premises before making this serious imputation upon highly respectable and intelligent witnesses. But we find him as

inaccurate in this matter as he is in his figures, for on turning to the testimony of Major Stickney (old Rec., p. 235), we see that he says, after giving estimates of the cost of coffer-dams, "these estimates were made, giving a depth of water for each coffer-dam *equal to the depth of water at these respective dams* AT THE TIME THEY WERE BUILT, and making an allowance in all items, except the filling, *for a rise of 3 feet of water*," that is for a rise of 3 feet UPON THE HEIGHT OF THE WATER AT THE TIME EACH DAM WAS BUILT. Now, is it not remarkable that counsel should have been so misled as to attribute to these engineers the absurdity of estimating upon no more than a rise of 3 feet of water as to work already done, with a record before them of the readings of the water-guage giving the condition of the river every day while the work was going forward?

We respectfully submit that these inaccuracies of the learned counsel show that neither the calculations furnished by his brief nor his criticisms of the testimony of the Government engineers can be accepted. Proceeding, as he does, upon a conviction of the accuracy of his premises, it is not to be wondered at, perhaps, that he presses with ardor these exaggerated demands, or, indeed, that he is betrayed into depreciating the sober estimates of Stickney and Scott, under whose eyes and directions the work was done.

That the court may not be misled by the figures on page 15 of claimant's brief, purporting to give the depth of the river at the sites of the piers and the abutment at which the claimants built coffer-dams, we beg to repeat that these figures *do not represent the depth of water, but the depth of*

the piers and the abutment below low-water, several of the piers having been carried down considerably below the bed of the river (*vide testimony of Weston, old Rec. p.* 31, *and of Scott, p.* 248). As the excavations made in the bed of the river for the purpose of thus sinking the piers were made necessarily *inside of coffer-dams resting on the bed of the river*, the depths of such excavations do not form an element in estimating the cost of the dams.

At page 14 of the claimants' brief great stress is laid on Stickney's estimates of the cost of the dam at pier 5. It is to be taken into consideration in such estimates that the Government always pays more for work, labor, and materials than individuals. These estimates before being treated as *criteria* for the guidance of the court in this case should be considerably reduced.

The next inquiry is as to the coffer-dams built by the claimants.

In Appendix A of this brief we give in tabular form *all* the estimates for *all* the dams.

In Appendix B we present in tabular form all that the claimants are entitled to recover for coffer-dams and work necessarily connected therewith.

The claimants demand compensation for building a coffer-dam at pier No. 5, which, according to their own witness, Harvey Tracey, who calls himself the foreman, building coffer-dams (old Rec., p. 157), broke before it was half done and had to be abandoned. It was afterward carried away by a rise in the river. It can hardly be that the Government is bound to pay for this part of a dam defectively constructed.

The estimates upon which the Government relies to

countervail this item of claim were carefully prepared by Stickney and Scott, engineers employed on the work, who knew the bed of the river, and had seen the work in all its stages.

The counsel for the claimants, thinking to extenuate the claimants' shortcomings in the matter of the coffer-dams, says that they "were stone masons and not carpenters skilled in the construction of coffer-dams; it should not be expected that they could, *on a moment's notice*, make the plans for dams and construct them with all the facility and skill of more experienced mechanics. And it was not their fault, but the fault of the Government, that they were *precipitated* into this branch of the work (Bf., p. 10). But so far from this being supported by the evidence, it abundantly appears that so beforehand were the claimants in this respect, that they began to build coffer-dams *the very day of their protest, namely, the 15th September*, 1869 (R., p. 93., Depo. Stickney). Indeed, this same witness tells us that before he went to the work, which was 21st July, 1869, and also afterwards and prior to the 15th September, 1869, the claimants had begun to make preparations for the construction of coffer-dams (p. 93, 232); that is to say, they had taken there a flat-boat with a steam engine and the proper rigging for running pumps, a dredging machine for the purpose of procuring filling for the walls of the coffer-dams besides material for coffer-dams.

Indeed, this witness says that so far back as August, 1869, the claimants "*commenced preparations for the dams by building a crib to serve as a breakwater*" (p. 232.) Another witness, General Warren (R., pp. 228, 229), speaks of

these preparations for coffer-dams prior to September 15th, 1869, the date of the protest, among which were certain iron rods which *could not have been used for anything else about the bridge than coffer-dams* (R., p. 230). Furthermore, General Warren testifie sthat the claimants at no time before their protest made inquiry of him as to what preparations the Government was making to build coffer-dams. It is true that about 4th, September, 1869, one of the claimants expressed an opinion that the Government should construct the dams, but *made no claim to that effect* (p. 232). Another important witness, Scott, says he had a conversation with Livesey some time in the spring of 1870 touching the coffer-dams, in which Livesey said it was their, the claimants', intention to build these dams until they found that if they did so they would have to make the excavations and prepare the beds; but that when they discovered this "*they concluded to deny the intention of building the coffer-dams*" (R., p. 247).

Is it not manifest, then, that it is to his imagination and not the evidence that the learned counsel is indebted for his statement that the claimants were *precipitated* into the work of building the coffer-dams?

And this brings us to another strange feature of the case. When the claimants found that they could not go on with the masonry without constructing the coffer-dams themselves, why did they not treat the refusal of the Government to build the dams as a recision of the contract, and bring suit in the usual way for the profits they would have made if they had been allowed to proceed with the contract?

REDUCTION IN AMOUNT OF MASONRY.

This claim is based on evidence so indeterminate and unsatisfactory that the court below dismissed it, as not affording proper warrant for judicial action, and founded its judgment as to this item on the *defendant's evidence*. The claimants and their witnesses deal too much *in generalibus*.

The Court of Claims rejected this demand.

This action of the court is earnestly assailed by the appellants on the ground that it amounts to a refusal to execute the mandate of this court recognizing this demand, as well as that for coffer-dams.

But, surely, whatever this court may have said on the former appeal as to this item, it cannot be presumed, for a moment, that it meant that the claimants should have double satisfaction for one and the same cause of action. If, then, the Court of Claims have shown that in receiving payment of the judgment heretofore rendered by that court the claimants did, as to part of said judgment, receive satisfaction upon the very same head of demand as that we are now considering, and beyond what they are entitled to claim here, we humbly submit that its decree should not be reversed merely because the Court of Claims, in rendering the first judgment, acted mistakenly or inconsistently; for if the Court of Claims has, as we contend, covered this item by the former judgment, that judgment is an absolute bar to the prosecution of any further demand on that head in that or any other court, or if not a technical bar, a sufficient warrant for a court of equity to proceed upon to the end of preventing what is unjust

and inequitable. Indeed, such a course would seem to be imperatively demanded by the very terms of the statute enlarging the jurisdiction of the court below.

Upon this point we shall do no more than refer to the able and lucid opinion of the court below, except to call the attention of the court to the exaggerated estimates of the witness Fraser, based on plans which came from the War Department, *but which it does not appear were shown the claimants before making their bid.*

This witness puts the whole number of cubic yards of masonary in the bridge at 15,632 (p. 220). This estimate, the witness says, is founded on General Rodman's plans; but in his invitation to the public to bid for the work General Rodman says "*the total amount of masonry is estimated at about* 10,000 *cubic yards*" (p. 6). Therefore, according to the witness, the general *underestimated to the extent of largely over* 5,000 *yards.* The truth is, General Rodman had *two* projections for a bridge, one of which, *and no doubt the one on which Fraser made his calculations,* called for 16,465 cubic yards of masonry, while the other, which is no doubt the one on which proposals were invited, called for 9,557 cubic yards. Certainly it is not to be supposed that General Rodman made the egregious mistake, which he must have made if Fraser's estimates are to be accepted as correctly framed on the plan General Rodman had in view when he invited proposals for the bridge.

This claim, founded in a reduction of the dimensions of the masonry, has no application to *the four abutments,* two of which (the Iowa land and the Island land) were not within the contract, while Rodman's plan as to the

other two underwent no change prejudicial to the claimants.

It will be observed that the claimants do not limit their claim under this item to the piers actually constructed by them, but they claim, in addition thereto, an allowance on *the work done by the Government* in building the other piers equal to the profit they would have earned on that work if they had done it under Rodman's plan. They do not sue for profits generally *on the whole contract* as they might have done and, strangely enough, did not do, *if there was any profit in the contract*, but they pick out one source of profit and claim to be allowed for it when at the same time it might be demonstrable, if the record contained the necessary evidence, that it would have been disastrous to them to have performed the contract, and so that the conduct of the Government has been beneficial to them. Indeed, the court below has said that the evidence fails to show anything more than the mere *injuria* of the breach, which entitles the aggrieved party to *nominal* damages only (new Rec., p. 13).

On the other hand, the Government claims that no allowance can be made on this head, saving for masonry actually built, on the principle *that what is done must be paid for.*

It is difficult to see how this court can do otherwise than allow a controlling force to the evidence of the Government engineers, who seem to have testified with great fairness, and without whose testimony the plaintiff's petition would have been dismissed *in omnibus.*

As to the demand for interest, we refer to the opinion of the learned court below.

THE DEFENDANT'S APPEAL.

It is urged in support of this appeal, and as the ground of it, that the Court of Claims should have dismissed the claimants' petition entirely, as being unsupported by competent evidence, and that it was error to make the expert testimony of the Government the basis of a decree against it. That evidence was introduced by the Government merely to put a check on the expert testimony of the claimants, *in case it should be deemed worthy of consideration;* and, being introduced with that view, it cannot be referred to as evidence which was introduced by the Government as having sufficient probative force to afford ground for judicial action.

We submit that the decree should be reversed in all things, with directions to dismiss the petition.

WM. A. MAURY,
Assistant Attorney General.

APPENDIX A.—ESTIMATES.

	Scott (pp. 244, 245, 246).	Stickney (p. 235).	Abbott (pp. 215, 216, 346).	Van Wagonen.
Davenport abutment:				Fifteen dollars per foot, running measure, p. 210. Dams, $36,000.
Dam	$781 18	$781 18	$1,687 58	
Pumping	216 00	180 00	476 77	
Excavating	84 16		504 00	
Preparing bed	69 00			
Pier No. 1:				
Dam	1,446 31	900 64	4,668 00	
Pumping	165 00	180 00		
Excavating				
Preparing bed	46 00			
Pier No. 2:				
Dam	2,363 83	1,614 02	5,592 00	
Pumping	504 00	330 00		
Excavating	250 00			
Preparing bed	69 00			
Pier No. 3:				
Dam	2,438 88	1,681 93		
Pumping	174 00	150 00		
Excavating				
Preparing bed	23 00			
Pier No. 4:				
Dam	3,933 28	2,987 63	6,495 00	
Pumping	330 00	300 00		
Excavating	100 00			
Preparing bed	46 00			
Pier No. 5:				
Dam	5,398 32	*772 71	1,376 40	
		*4,583 69		
Pumping	622 00	*510 00		
Excavating	870 75	*1,022 97		
Preparing bed	46 00			
Upper rest:				
Dam	3,107 92	2,294 92	8,356 96	
Pumping	411 00	300 00		
Excavating	77 55			
Preparing bed	92 00			
Pivot pier:				
Dam	2,187 92	1,762 16	4,842 56	
Pumping	270 00	195 00		
Excavating				
Preparing bed	46 00			
Lower rest:				
Dam	2,081 73	1,619 07	3,698 19	
Pumping	180 00	150 00		
Excavating				
Preparing bed	23 00			
Island abutment:				
Dam	1,348 17	1,241 40	3,780 98	
Pumping	210 00	180 00		
Excavating	220 00			
Preparing bed	23 00			
Breakwaters		4,000 00		

*Actual cost.

APPENDIX B.

	Amount.	Total.
Iowa shore abutment:		
Dam	$781 18	
Pumping	216 00	
Excavating	84 16	
Preparing bed	69 00	
		$1,150 34
Pier No. 1:		
Dam	1,446 31	
Pumping	165 00	
Excavating		
Preparing bed	46 00	
		1,657 31
Pier No. 2: Dam	2,363 83	
Pumping, Excavating, Preparing bed } all done by United States		
		2,363 83
Pier No. 4: Dam	3,933 28	
Pumping, Excavating, Preparing bed } all done by United States		
		3,933 28
Upper rest (pp. 165, 363, 154, 196), one-third of $3,107.92		1,035 97
Pivot pier:		
Dam	2,187 92	
Pumping	270 00	
Excavating by United States		
Preparing bed	46 00	
		2,503 92
Lower rest:		
Dam	2,081 73	
Pumping	180 00	
Excavation by United States		
Preparing bed	23 00	
		2,284 73
Island abutment:		
Dam	1,348 17	
Pumping	230 00	
Excavation	220 00	
Preparing bed	23 00	
		1,801 17
		16,729 45